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# FEDERAL JUSTICE





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EDMUND RANDOLPH  
From a Portrait in the Department of Justice

# FEDERAL JUSTICE

*Chapters in the History of Justice and  
the Federal Executive*

BY

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AND

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## BY WAY OF INTRODUCTION

THIS volume is not a lawbook. Nor, on the other hand, is it a popularized description of the Department of Justice or of racketeers, lawsuits, prisons, and politics. It is instead the story of men, emotions, methods, and motives in that crucial zone of law and government bordering both upon the courts and the executive.

Absorbed, as other Attorneys General have been, in the insistent public questions of the day and faced, at the same time, with countless details of organization and administration, I often wondered, and sought finally to determine, how other men in other times had met like problems.

No Department of Justice existed prior to 1870, though there had been an Attorney Generalship since 1789. For the three significant decades immediately following the establishment of the federal government few official records of the Attorneys General were to be found anywhere, though stored in the Library of Congress there were discovered incomplete letter books, opinion books and bundles of manuscripts and correspondence covering the period from 1817 to 1870. In the Department of Justice there was a huge mass of undigested papers for the years since 1870.

The first letter book disclosed that President Monroe's Attorney General, William Wirt, on assuming office, found to his amazement no scratch of the pen indicating the duties of his position or preserving the work of his predecessors. He it was who began the record system which, with various elaborations and changes, was followed until 1904. Through the years files were kept in a more or less complete fashion. Although departmental procedures grew and became established through custom, substantive rules of action for the nation's executive law officers were but rarely recorded and were based upon general knowledge or upon precedent and practice of vague or unknown origin. Matters to a great extent were left to be governed by the exigencies of the moment. Indeed, even the formal

opinions of the Attorneys General had never been brought together in a complete collection.

I determined to gather and classify such records as were available. In rounding out the story it was necessary to resort to private manuscript collections and miscellaneous historical sources. To analyze and arrange this huge store of diverse material, which has been accumulating for a century and a half, and to make it more readily available and understandable has been a task of magnitude and is still in progress.

As the work went forward, it became apparent that a picture of American history from a new point of view was unfolding before our eyes. The executive law officers had played an important rôle in the fascinating drama of national life. Their activities had been interwoven in the most intimate fashion with stirring public events and the careers of outstanding personages since the Constitution was framed. The archives of the Department of Justice and related materials proved to be a rich source of authentic data.

The records of the administrations of Presidents Washington and Adams, for example, reveal the interpretation of the powers of government when its founders sat in the public councils with no guide before them other than the simple phrases of the Constitution. Their writings disclose a groping for means of executing the laws. Thence down the years, through periodic crises and amid changing demands of policy, the spirit of American government evolved and its structure took shape. The formal propositions of statesmen and judges take on a warm significance in the light of the human conflicts which called them forth. The trail leads inevitably to the legal contentions and methods of the present time. The very words and arguments of today find their ancestral thoughts in every era of our national history.

A government of laws makes heavy demands upon those who tend its administration. For a century and a half, men of substance and character have devoted themselves to this task. From the safe vantage of the years we may look back upon their triumphs and mistakes. To be sure, there are sordid chapters and many unhappy and unflattering incidents in the history of federal justice. In its field, it has followed the main currents of American life. From the very

*nature of things, it is not the unending routine which sharply engages attention, but rather the unusual, the irritating, and the unjust which find their way alike into the press, the courts, and the Department of Justice. Great controversies throw into relief the development and processes of government. They point the moral and illustrate the hazards ever present in the daily work of the law and in its battles upon a thousand fronts.*

This book, in a very real sense, is the by-product of the intensive studies we have made. Manifestly it cannot cover the entire field, but within its limitations it will be found, I hope, both authentic and helpful. It offers hitherto unavailable information and reveals many aspects of American life little understood or long forgotten. These considerations may give to the work an interest which its qualities would not otherwise warrant.

The references appended to the text serve chiefly to assist those pursuing special or technical fields of inquiry. Occasionally they amplify the text in matters which may not interest the general reader. A short description of sources of material is to be found in the bibliographical note at the end of the volume.

Carl B. Swisher and Preston W. Edsall have given invaluable assistance in the collection and organization of the archives of the Department of Justice. Through their historical training and rich scholarship, they have supplied a fresh and broad viewpoint. Special thanks are due also to Margaret Blander, Bernard F. Cataldo, Patricia Collins, Gwendolyn Folsom, Abraham Glasser, Nelson A. Sharfman and Clifford R. Stearns. Many others have made valuable suggestions and have supplied materials and information. Carl McFarland, who has collaborated with me in producing this book, joins in expressing deep gratitude to these indispensable associates in our common venture.

HOMER CUMMINGS.

Washington, D. C.  
January, 1937.





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## FEDERAL JUSTICE



## CHAPTER I

### THE SUPREME LAW OF THE LAND

ON December 21, 1786, George Washington sat writing to his personal attorney, Governor Edmund Randolph of Virginia: "However delicate the revision of the federal system may appear, it is a work of indispensable necessity. The present Constitution is inadequate. The superstructure totters to its foundation, and without helps will bury us in its ruins." Yet Washington who had declined to attend in Philadelphia a meeting of the Society of the Cincinnati—the officers of the Revolutionary Army—added that he could not attend the Constitutional Convention "precisely at the same moment on another occasion without giving offence."

Randolph pleaded. Had not Washington himself seen "the increasing languor of our associated republics"? But the former American commander persisted in his refusal. "No mind," he acknowledged, "can be more impressed than mine is with the awful situation of our affairs—resulting in a great measure from the want of official powers in the federal head." To James Madison, Randolph wrote, "General Washington will be pressed again and again; but I fear ineffectually." Once more he urged Washington, "Every day brings forth some new crisis." Washington finally accepted, not without regret.<sup>1</sup>

Within three years from the date of the first of these letters, a fundamental but peaceful change of government made it possible for Washington to be President under a new Constitution and to look about for "the fittest characters to expound the laws and dispense justice," and for Thomas Jefferson to note that "E. Randolph is Atty. Genl. for the Supreme court." <sup>2</sup>

The old Articles of Confederation had conferred upon the Conti-

<sup>1</sup> Conway, *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph* (1888), 62-67.

<sup>2</sup> Sparks, *Washington's Writings* (1836), X, 34; Ford, *Jefferson's Writings* (1895), V, 138.



mental Congress authority over peace and war, but even then the states might veto requests for men and money. There was no law recognized as binding throughout the land. The successful termination of the Revolutionary War had confirmed a growing theory of absolute and separate state sovereignty, which quickly ripened into independence from the Continental Congress. The colonies had become not a free and independent state but, in the words of the Declaration of Independence, "FREE AND INDEPENDENT STATES."

Nor could the "common" law of England supply the legal uniformity necessary for commerce or the protection of property of citizens of other states. Now so generally accepted as the basis of American justice, it was reviled by the colonists both before and after the Revolution. In 1687 a Massachusetts judge admonished counsel from the bench, "We must not think the laws of England follow us to the ends of the earth." In some states, statutes specifically outlawed common law. "I deride," said Thomas Jefferson, "the ordinary doctrine that we brought with us from England the Common Law rights." The Governor of Virginia lamented "the unfortunate practice of quoting lengthy and numerous British cases." In New Hampshire the judges refused to listen to citations from "musty, old worm-eaten books" or arguments upon "quirks of Coke and Blackstone." And in some states, indeed, lawyers were forbidden by statute to refer to the doctrines and precedents of the common law.<sup>\*</sup>

Courts and lawyers, too, were but the instruments of disowned royal power. At first the colonies had no trained judges. The legislatures and the governors held what courts there were. When independent courts were established, the judges, with infrequent exceptions until the time of the Revolution, were not lawyers. Attorneys, who were "largely traders, land speculators, and laymen of clever penmanship and easy volubility," were characters of disrepute, restricted by the local laws, and in many places forbidden to receive fees.

<sup>\*</sup> Warren, *History of the American Bar* (1913), 11-15, 60, 135-136, 141, 225-227, 232, 235-236. Compare Chalmers, *Colonial Opinions* (1858), 206 *et seq.*

While, in the 1700's, commerce, education, and libraries brought with them lawyers of training and ability—who had become the orators of the Revolution and of the new American republics—the war with England had depleted the royalist bar. The lawyers who remained were employed in politics, were representing returned Tories seeking their confiscated estates, or were collecting debts for English creditors. Other people's misfortunes made lawyers busy and sometimes rich. They were soon hated. Abolition or restraint of "that order of Gentlemen denominated Lawyers" was sought by some communities. "What a pity," wrote the author of *Letters of an American Farmer* in 1787, "that our forefathers who happily extinguished so many fatal customs . . . did not also prevent the introduction of a set of men so dangerous." Laymen were authorized to perform legal services, and proposals for a new form of government were decried as the invention of lawyers.<sup>4</sup>

The United States had been recognized by statute in some states as "a Body politick and corporate" for the purpose of suing in state courts for property, debt, or damages.<sup>5</sup> It made no laws. But the Articles of Confederation did confer upon Congress full power to make treaties. The states had no veto over treaties, yet they could pass local laws which made it impossible for private persons to secure the rights conferred upon them by treaty. Here lay materials for controversy. Legislatures assumed to interpret the Treaty of Peace. Governors signed statutes which operated to deny British creditors the collection of debts. The status and property of Tories were made difficult or insecure by acts violative of treaty provisions.<sup>6</sup>

Curiously enough, it was from the hated terms of the Treaty of Peace itself—those regarding British debts and property—that the states felt feeble stirrings of a national law. Hardly had the Treaty of Peace been ratified when it came into conflict with an unfriendly state measure, the Trespass Act which passed the New York legislature on March 17, 1783.<sup>7</sup>

In the mayor's court in New York City, Alexander Hamilton

<sup>4</sup> Warren, *op. cit.*, 3-10, 15-18, 211 *et seq.*

<sup>5</sup> *E.g.*: N. J. Laws (Wilson, 1784), 52; Conn. Acts and Laws (1784), 259.

<sup>6</sup> Jay, Report, Oct. 13, 1786, Secret Jr. Cong. (1821), IV, 185-287.

<sup>7</sup> Laws of N. Y. (6 Sess. 1783), 283-284.

appeared as counsel for the Tory occupant of a patriot widow's brewery. Tory Waddington held the brewery under the authority of the British commander in New York, but the Trespass Act forbade him to plead this in justification of his possession. Hamilton argued that the Trespass Act was in conflict with the Treaty of Peace, that the treaty power of Congress was legislative and paramount to state law, that the judges of each state must "of necessity" be judges of the United States and recognize the law of Congress as a part of the law of the land, and that where two laws conflict the more important concerns ought to prevail.<sup>8</sup>

This argument was remarkable for its time. Congress, said Hamilton, exercised a delegated legislative power which the sovereign states could not contravene, and state judges were responsible for its proper application. The court, speaking through the talented mayor, James Duane, admitted the binding authority of the treaty. "Our union," said he, "is known and legalized in our constitution and adopted as a fundamental law in the first act of our legislature. The foederal compact hath vested Congress with full and exclusive powers to make peace and war. This treaty they have made and ratified, and rendered its obligation perpetual. And we are clearly of opinion that no state in this union can alter or abridge, in a single point, the foederal articles or the treaty."

Yet Duane and his associates could not bring themselves to declare the Trespass Act void. True, the authority of the treaty was paramount and the judges so far as they had power would never suffer it to be violated or questioned. These judges, however, like most loyal students of Blackstone, refused to call in question the supremacy of the New York legislature. "If they think fit *positively* to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed, and the intention manifest, the Judges are not at liberty . . . to reject it; for this were to set the *judicial* above the legislative, which would be subversive of all government."<sup>9</sup>

<sup>8</sup> Dawson, *The Case of Elizabeth Rutgers versus Joshua Waddington* (1866), xvii and 38; Morris, *Select Cases of the Mayor's Court of New York City*, 1674-1684 (1935), 57-59, 302; Hamilton, *History of the Republic* (1859), III, 16-19.

<sup>9</sup> Dawson, *op. cit.*, 38, 41. Besides the Mayor, Recorder Varick and Aldermen Blagge, Gilbert, Neilson, Randal, and Ivers occupied the bench.

Here were suggestions, however, that there existed a national law, binding on the states, and that there was means of enforcing it. These ideas were destined to take deep and permanent root. The United States meanwhile felt diplomatic embarrassment in claiming their own rights under the treaty. The British did not surrender the northwest military posts; and when on November 13, 1785, John Adams, the American minister to Great Britain, protested, he was plainly told that the British recognized their obligation and intended to meet it when and if the United States fulfilled *their* obligations with respect to the rights of British subjects and Tories under the treaty.

Congress thereupon directed John Jay, the Secretary for Foreign Affairs of the Confederation, to investigate the truth of the British charges that treaty violations were unchecked in America. Jay's report, dated October 13, 1786, exhaustively set forth the story of treaty violation, article by article, state by state. It substantiated Britain's position and demonstrated how impossible it was for the United States to meet its international obligations amid unrestrained application of doctrines of state sovereignty. Jay recommended and Congress agreed that the states be requested to repeal the local statutes. A letter and form of act to be passed were dispatched to each state.<sup>10</sup>

Ultimately at least nine states accepted this proposal from Congress. Several states complied before the Constitutional Convention assembled in Philadelphia, and Maryland went so far as to declare specifically that the Treaty of Peace "is the supreme law of the land within this State and shall be so adjudged in all courts of law and equity." Rhode Island and North Carolina followed this precedent, after the Constitutional Convention had adjourned.<sup>11</sup> The idea that there was a general law of the United States which individual states could neither alter nor escape had made headway.

The Constitutional Convention met in May 1787. Thomas Jef-

<sup>10</sup> Secret Jr. Cong. (1821), IV, 185-287, 295-296, 329-338.

<sup>11</sup> In 1787, Md. (April), Laws (Kilty, 1800); Mass. (April), 1 Perpetual Laws (1788), 393-394; Conn. (May), Laws (1786-1790), 351; N. J. (June), Laws (Paterson, 1800), 82; N. H. (June), Perpetual Laws (1789), 164; R. I. (Sept.), Acts, Sept. Sess., 9; N. C. (Nov.), Laws (Martin, 1804), 430. In 1788, Del. (Feb.), 2 Laws (1797), 917; N. Y. (Feb.), 2 Laws (1886), 679.

ferson, American minister to France, wrote Edmund Randolph from Paris: "I am in hopes at least you will persuade the States to commit their commercial arrangements to Congress, and to enable them to pay their debts—interest and capital. The coercive powers supposed to be wanting in the federal head, I am of opinion, they possess by the law of nature, which authorizes one party to an agreement to compel the other to its performance. A delinquent State makes itself a party against the rest of the Confederacy."<sup>13</sup>

Edmund Randolph, on behalf of the Virginia delegates, recommended that Congress be given the power "to negative all laws passed by the several states, contravening in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the union." The form of this resolution met opposition in debate, and Luther Martin of Maryland introduced a version of the New Jersey plan. His resolution provided that "the legislative acts of the United States made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States . . . and that the Judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding." This the Convention unanimously adopted.<sup>14</sup>

Four changes were yet to be made. State *constitutions* as well as state laws were made subject to the federal laws and treaties; the federal *constitution* was added to the federal laws and treaties as "the supreme law of the several states"; treaties *formerly* made were also included; and finally the committee on style changed "supreme law of the several states" to "supreme law of the land."<sup>15</sup>

Still the state executives, legislatures, and courts might interpret the national constitution, laws, and treaties differently—might disagree among themselves and with Congress. This difficulty was removed by provision in Article III for a federal judiciary with juris-

<sup>13</sup> Conway, *op. cit.*, 167.

<sup>14</sup> Jr. Const. Conv. (1819), 69, 126; Warren, *The Making of the Constitution* (1928), 220 *et seq.*, 319.

<sup>15</sup> Warren, *op. cit.*, 321, 322; Meigs, *The Growth of the Constitution* (1900), 287; Constitution, Art. VI.

diction over "all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties."

Here, on paper, was a government. There were to be courts, a Congress, and a President. "Executive Departments" and "other Officers of the United States" were merely mentioned in Article II in connection with reports and appointments. The Constitution in its final form provided that "the supreme Law of the Land" was to be applied by judges in "Cases in Law and Equity."

But how were these cases to be brought or defended? Who was to determine what cases to bring? What means were to be supplied for this work? Who were to perform the functions of judges, of sheriffs, of attorneys for the nation? Here contending forces might promote or nullify the execution of the laws, by direct or subtle means. And here have developed the undercurrents of federal justice through the calm and storm of a century and a half.

## CHAPTER II

### CROWN COUNSEL AND ATTORNEYS FOR THE REPUBLIC

IN 1696 the Council of Trade in England had received proposals for the enforcement of the navigation laws and recommendations for attorneys general in the American colonies in place of those "ignorant of the law and abettors of illegal trade." The colonists shed few tears for the navigation acts, but they were concerned with the enforcement of their own laws.

"One crying sinne that may procure impending judgments further to come down on our land as well as those that are already inflicted on us, is the neglect of putting good lawes in execution." So spoke the Assembly of Connecticut in 1704, upon directing that there be appointed in each county "a sober, discreet and religious person . . . to prosecute and implead in the lawe."<sup>1</sup> In one form or another the system of attorneys general and local prosecutors continued in the states. The new national government, however, had to create law officers and a system for the execution of the federal laws.

In England, in the earlier days, separate "King's sergeants" or "King's attorneys" appeared before particular royal courts as representatives of the Crown. About 1400, with the appointment of certain attorneys to act for the King in all courts, the office of attorney general became recognizable. By 1461, these attorneys were permitted to deputize others and in the same year a solicitor, later to be called the solicitor general, was appointed to aid the attorney general.

These officers grew rapidly in importance during the sixteenth century. Like the justices and the proud medieval order of King's sergeants, they were summoned to attend and give advice to the House of Lords and one or the other was always a member of the House of Commons. Through their offices lay the road over which

<sup>1</sup> *Infra*, nn. 4 and 25.

such men as Coke, Bacon, and North passed to high judicial place.<sup>a</sup>

These were modern, not medieval, offices. They reached their form as the American colonies were being settled, and their counterparts were soon found in the New World. Virginia's first attorney general, Richard Lee, received his appointment in 1643, and after 1662 the line continued without interruption. Normally the law officers for the colonies came into existence by virtue of executive action, but in Rhode Island the General Court in 1650 determined "to apoynt an Attorney Generall for the Colonie, as also a Solicitor . . . and because envy, the cut throat of all prosperitie will not faile to gallop with its full careere, let the sayed Attorney be faithfully ingaged and authorized and encouraged . . . for the people, by, or in the peoples name, and with their full authoritie assisted."<sup>b</sup>

The English government, just at the close of the seventeenth century, took sudden interest in the colonial American attorneys general. Edward Randolph, the determined and energetic surveyor general of the customs for North America, saw clearly that the efficient enforcement of the navigation acts required that colonial antipathy toward them be circumvented, since it could not be prevented. To this end, he aided in the creation of courts of vice-admiralty in America, properly staffed, in which the King's interests should have the advantage of loyal advocacy. Let America be divided into several districts; in each of these districts let an able advocate general be appointed, not by colonial governors who were themselves too frequently unsympathetic toward the laws, but by the King. Let this advocacy be combined with the attorney generalship, so that the King's interests would be loyally served in the regular courts as well. The present attorneys would not do, he urged, for they were either ignorant or corrupt. William Randolph of Virginia "knows nothing of the law." George Plater, one of the few non-Papist lawyers in Maryland, so far disregarded his dual responsibility as attorney

<sup>a</sup> Bellot, *Origin of the Attorney General* (1909), 25 Law Q. Rev. 410; Holds-worth, *History of English Law* (1924), VI, 457-472.

<sup>b</sup> R. I. Col. Rec. (1856), I, 225; see William & Mary College Hist. Q. (1st Series; 1902), X, 33, 140, 166; Rugg, Mass. Hist. Soc. Proceedings (1922), LVI, 171-172; *Office of Attorney General*, 12 Law Reporter (NS) 43-48 (1850); *Commonwealth v. Kozlowsky*, 238 Mass. 379 (1921); 8 Mass. L. Q., No. 3, 15 (1923).



general and customs collector that he failed to prevent illicit trade between Maryland and Scotland. David Lloyd in Pennsylvania stubbornly refused to enforce the acts, and Anthony Checkley of Massachusetts combined ignorance of the law with skill in its violation.<sup>4</sup>

The Randolph plan created a stir. The Council, the Lords of Trade, and the Commissioners of the Customs joined in its consideration, and His Majesty's attorney general was asked for an opinion on the King's right to appoint attorneys general for the proprietary and corporate colonies "notwithstanding the Grants and Charters to the said Colonys and Provinces."<sup>5</sup> The plan was adopted with minor amendments. The King did not assume to appoint attorneys general for the proprietary and corporate colonies, but instead the attorneys general in the royal colonies were often commissioned as "advocates general" as well and their jurisdiction broadened to cover the other colonies.<sup>6</sup>

Many colonial attorneys general, however, had been men of substance and genuine ability. Thomas Rudyard,<sup>7</sup> David Lloyd,<sup>8</sup> and Edward Chilton<sup>9</sup> from the seventeenth century list learned their law in England, but most of their contemporaries lacked such formal training. The eighteenth century saw several outstanding figures appointed. James Alexander, the father of Lord Stirling and tutor of Governor Livingston of New Jersey, served for a time in New Jersey and New York.<sup>10</sup> Andrew Hamilton, the hero of the famous Zenger trial involving the freedom of the press, was for years attorney general in Pennsylvania.<sup>11</sup> Virginia's line showed great distinction, including Benjamin Harrison,<sup>12</sup> Peyton and John Randolph,<sup>13</sup> George Wythe,<sup>14</sup> and Edward Barradall whose reports of Virginia colonial decisions ornament early American law.<sup>15</sup>

<sup>4</sup> Cal. St. Papers, Col., Am. & W. I., 1696-1697 (1904), 59, No. 120; 71-72, No. 149; 83, No. 165; 401, No. 813.

<sup>5</sup> Cal. St. Papers, Col., Am. & W. I., 1696-1697 (1904), 188, No. 352; 2 Acts of the Privy Council, Col. (1910), 306, No. 639.

<sup>6</sup> See 2 Acts of the Privy Council, Col. (1910), 363, No. 815; Cal. St. Papers, Col., Am & W. I., 1699, 432, No. 769, XVIII.

<sup>7</sup> Edvall, *Journal of the Courts of Common Right and Chancery* (1936).

<sup>8</sup> Dict. Am. Biog., XI, 329.

<sup>9</sup> William & Mary College Hist. Q. (1st Series; 1902), X, 33.

<sup>10</sup> Dict. Am. Biog., I, 167.

<sup>11</sup> *Id.*, VIII, 181.

<sup>12</sup> William & Mary College Hist. Q. (1st Series; 1902), X, 140.

<sup>13</sup> Dict. Am. Biog., XV, 362, 367.

<sup>14</sup> Americana (1914), XXII.

<sup>15</sup> Dict. Am. Biog., I, 642; *Virginia Colonial Decisions* (Barton, 1909), II.

Among the Massachusetts group, James Otis, Jr., appears. He it was who became a link in the chain between Coke and the post-revolutionary exponents of judicial review when, in his famous argument against the writs of assistance, he said: "Thus reason and the Constitution are both against this writ. . . . But had this writ been in any book whatever, it would have been illegal. No acts of Parliament can establish such a writ; though it should be made in the very words of the petition it would be void. An act against the Constitution is void."<sup>16</sup>

The coming of independence brought no sharp break with the past so far as the administration of justice was concerned. New judges and new law officers replaced their royalist predecessors. In providing law officers, those who drafted state constitutions restricted themselves to problems of appointment, tenure, and removal. They apparently felt no more necessity to define the duties of an attorney general than to define those of a chancellor or a judge. Common law, colonial custom, and occasional acts of provincial legislatures had already prescribed the powers and duties of the office. Only Rhode Island had a general statute on the subject. Basically, the powers and duties of an American attorney general were those of the attorney and the solicitor general of England.

These officers appeared in the courts on behalf of the Crown and gave legal advice to all departments of the state.<sup>17</sup> They not only represented their government in the tribunals of justice, as private counsel appear for private clients, but as a practical matter they wielded vast powers in determining what criminal or civil cases should be instituted, whom to sue, and whether and how to defend cases against the government. They might enforce the laws wisely, inequitably, or not at all, exercising customary powers which the courts did not control. When the New York Assembly, in 1727, attempted to curb the authority of the attorney general in the institution of prosecutions except upon

<sup>16</sup> Haines, *The American Doctrine of Judicial Supremacy* (2 ed. 1932), 60.

<sup>17</sup> Holdsworth, *op. cit.*, VI, 457-458. And see Norton-Kyshe, *Colonial Attorneys General* (1900); Robertson, *Civil Proceedings by and against the Crown* (1908), 9 *et seq.*; *Fletcher v. Merrimack Co.*, 71 N. H. 96 (1901); *Commonwealth v. Kozlowsky*, *supra*; *Public Utility Commissioners v. Lehigh Valley R. R. Co.*, 106 N.J.L. 411 (1930); *Hawkins v. Maryland*, 81 Md. 306 (1895); *People v. Miner*, 2 Lans. 396, 398-399 (1868); R. I. Col. Rec., 1636-1663 (1856), I, 225.

order of the governor in council, the attorney and the solicitor general of England promptly pronounced it a "high encroachment."<sup>18</sup> These colonial officers were "attorneys" only in the sense that they performed their functions in the courts of law. They were lawyers, but their powers were the powers of the state.

From the outset colonial law officers had given legal advice to officers of government, although Governor Fletcher of New York had discharged the attorney general from regular attendance in council when legal matters were discussed and told him that he would be summoned if wanted.<sup>19</sup> Fletcher's successor Bellomont insisted that even when an opinion was requested and given it might be disregarded. New York, in 1699, was without courts of judicature, and the General Assembly failed to provide them. Bellomont found in his commission power to establish courts and proposed by ordinance to set up courts precisely like those formerly provided by legislation. He invited Chief Justice Smith and Attorney General Graham to give him their opinions as to the legality of the proposed action. Both replied that the King had no power to establish courts other than by legislative act and hence could not confer the power upon a governor. "I told Col. Smith and Mr. Graham," Bellomont wrote to the Lords of Trade, "that I could not conceive the King's Attorney General in England, who drew the Letters Patents, would let the King convey such power to a Governor as could not be justified in law. . . . You see by this what trouble I undergo for want of . . . a good Attorney General to advise me in behalf of the King."<sup>20</sup> Shortly thereafter Bellomont issued the ordinance he desired.

The main theatre of activity for the attorney general, however, was the courts. There he represented the King in many matters—the collection of revenue and quit rents, the enforcement of navigation laws, and the prosecution of criminals. The English attorney general possessed full power to conduct criminal trials in behalf of the King, but in practice only those of great state importance

<sup>18</sup> Norton-Kyshe, *op. cit.*, 17-21; Chalmers, *op. cit.*, 493-497 and *Opinions of Eminent Lawyers* (1814), II, 180-184.

<sup>19</sup> Cal. St. Papers, Col., Am. & W. I., 1697-1698, 304-305, No. 622, II.

<sup>20</sup> *Id.*, 1699, 210-211, No. 381 (May 13, 1699). See, on the opinion function, *id.*, 1696-1697, 242-243, No. 475, 253-254, No. 501; Chalmers, *op. cit.*

received his attention. The colonial attorneys general, on the other hand, not only possessed the power but early began to exercise it in both the important and the unimportant cases. To explain how this came about is to explain the origin of a fundamental distinction between the administration of criminal justice in England and America—a distinction which exists in a considerable degree to this day.<sup>21</sup>

In England private citizens were expected and encouraged to prosecute those suspected of crime. But private prosecution, though certainly legal in the colonies,<sup>22</sup> was not suited to survive in pioneer society. It entailed both effort and expense to the private prosecutor, who was obliged to employ a lawyer to conduct the preliminary stages of the prosecution and even the trial itself. Furthermore, criminal business as compared with civil litigation was not extensive. Few lawyers could hope to make a living from criminal cases. Indeed, not until the abolition of the rule denying counsel to felons, near the time of the Revolution, was there occasion for the "criminal lawyer" to appear.

The attorney general himself was concerned with making a livelihood. His salary was small, and he was expected to derive most of his income from private practice. By assuming criminal prosecutions, he could monopolize one considerable body of litigation and thereby increase his fees and advertise his skill. It was also convenient. Criminal courts and civil courts ordinarily sat on the same or successive days. It would look peculiar for the King's attorney general, who came down to a *nisi prius* court to prosecute an ejectment case for a private client, to disregard the King's suit the next day against a felon in the court of oyer and terminer.

In a few colonies and states the attorney general had an assistant in the solicitor general who shared his work. Neither in Rhode Island nor in Maryland did the office survive. In Massachusetts the office of solicitor general came into existence under peculiar circumstances in 1767. There Jeremy Gridley was attorney general and Jonathan Sewall was "special attorney general." Gridley objected

<sup>21</sup> On the relationship of the Attorney General to criminal prosecutions in England, see Howard, *Criminal Justice in England* (1931); Maitland, *Justice and Police* (1883), 141-145.

<sup>22</sup> In West Jersey, for example, Leaming and Spicer, *Grants and Concessions* (1881), 429, 539.

to Sewall's title as "an absurdity in the very term." Sewall was then named solicitor general. Massachusetts and New Hampshire continued their solicitors after the Revolution, and North Carolina created the office in 1790.<sup>18</sup>

As the colonies increased in wealth and population and spread over a greater area, crime increased and courts became more numerous and their sessions more frequent. The demands of the King's business grew in proportion, and the private practice of the attorney general likewise increased. He could not attend all courts; neither could he try all the King's cases. Consequently, deputy attorneys general began to appear in many colonies.

The deputy attorney general was well known early in the eighteenth century and remained the local prosecutor in New York, New Jersey, Pennsylvania, Delaware, and Maryland, when the Constitution of the United States was adopted.<sup>19</sup> In a few instances local prosecutors had been the rule from the first. West New Jersey never had her own attorney general, but from 1696 until all New Jersey became a royal province her general assembly annually chose a King's attorney for each county. The Assembly of Connecticut in 1704 directed that "henceforth there shall be in every countie a sober, discreet and religious person appointed by the Countie Courts to be Attorney for the Queen, to prosecute and implead in the lawe all criminall offenders, and to doe all other things necessary or convenient as attorney to suppress vice and imorallitie"—an inspiration which came from the warnings of the "publick ministrie" and other "wise and pious persons."<sup>20</sup>

Thus, the American colonies and their successors, the states, carried over into the 1780's a fairly coherent system of courts and law officers for the administration of justice. The system was

<sup>18</sup> R. I. Col. Rec. (1856), I, 225; *id.*, III, 151; Cal. St. Papers, Col., Am. & W. I., 1696-1697, 242-243, No. 475; 253-254, No. 501; Poore, *Federal and State Constitutions* (1878), 966, 1288; Mass. Reports, 1761-1772 (Quincy, 865), 241, 300, 331; Adams, *Works of John Adams* (1836), X, 179; North Carolina Manual of Laws (Haywood, 1819), 550; Norton-Kyshe, *op. cit.*, 1-2.

<sup>19</sup> 1 Del. Laws (1797), 57; 2 N. Y. Col. Laws (1894), 406; Leaming and Spicer, *op. cit.*, 344; *People v. Kramer*, 68 N. Y. S. 383 (1900); *State ex. rel. Clawson v. Thompson*, 20 N. J. L. 689 (1846); *Commonwealth v. English*, 11 Phila. 439 (1876); 2 Md. Laws, 1795, Ch. 74 (Kilty, 1800).

<sup>20</sup> Leaming and Spicer, *op. cit.*, 544; Conn. Col. Rec., 1689-1706 (1868), 468. This is still the method of appointment in Connecticut, Conn. Gen. Stat. (1930), Sec. 5365.

assumed for the federal government by the framers of the new Constitution. They had provided for a national legislature, an executive, and a judiciary. There remained the problem of providing an organization for the executive and the actual creation of the courts.

This work the first session of Congress performed. The administrative duties of the central government Congress distributed between three departments—Foreign Affairs (or State, as it soon became), War, and Treasury. The governors' councils of colonial times and the ministers of English parliamentary government were precedents, and the Congress of the Confederation had created secretaryships of Foreign Affairs, War, Marine, and Finance.\*\*

The courts, however, presented a more difficult problem. Every one admitted the necessity for a Supreme Court and the Constitution mentioned such a tribunal as well as "inferior" courts. Yet the decision to establish a complete system of federal courts, of trial as well as appellate jurisdiction, was reached only after sharp disagreement. The new structure, as at last approved by President Washington on September 24, 1789, in "An Act to establish the Judicial Courts of the United States," provided, besides a Supreme Court with a chief justice and five associates, a "district" court and district judge for each of the states and three "circuit" courts whose benches were to be filled by two Supreme Court justices and the judge of the district within which the court happened to be sitting. But the new federal courts were not separated into courts of equity, law, and admiralty according to the historic Anglo-American model.††

While of course this judicial system was designed to settle some classes of controversy between private parties, the judges were also charged with deciding that large group of cases wherein the new federal government sought to enforce its laws or private parties sought to compel the government, through its officers, to act in accordance with the Constitution and statutes. That the United States

\*\* 1 Stat. 28, 49, 65, July 27, Aug. 7, and Sept. 2, 1789; Jr. Am. Cong. (1823), III, 564, 575.

†† Warren, *New Light on the History of the Judiciary Act of 1789* (1923), 37 Harv. L. Rev. 49, 65 *et seq.*, 123 *et seq.*; 1 Stat. 73, Secs. 1, 2, 3, 4, 9, 11, Sept. 24, 1789.

would be a party to or have great concern in a large percentage of the cases in these courts was obvious and intended. The executive officers of the federal government, like their royal predecessors, would also need legal advice to guide them in that "government of laws" demanded by the political philosophy of the time.

In 1781 the Congress of the Confederation had given thought to strengthening the hand of the central government, had proposed to look to an attorney general for legal opinions, and had planned to have him prosecute all suits for the United States before a court of judicature, which was also under consideration, and in the state courts where he might appear by deputy.<sup>22</sup> Under the new Constitution the final section of the statute which created the federal courts provided for the appointment of "a meet person, learned in the law, to act as attorney general for the United States . . . to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." Under this basic statute the attorneys general were to perform their tasks of office until the Civil War.

The Attorney General of the United States was required to appear only in the Supreme Court. This wording of the thirty-fifth section of the Judiciary Act may have been accidental. Those who desired only a federal Supreme Court, leaving the trial work to state courts, would not likely object to confining the Attorney General to the Supreme Court. The original draft of the Judiciary Act had proposed that the district and Supreme courts each appoint the attorney to appear before them on behalf of the government.<sup>23</sup> Under such an arrangement it was but natural for the duties of those attorneys to be limited to the courts which had appointed them. When this plan of appointment was abandoned, the wording of the section was not revised and the Attorney General remained charged only with the duty of appearing before the Supreme Court.

For the lower federal courts, the same section of the Judiciary

<sup>22</sup> Jr. Cont. Cong. (1912), XIX, 156.

<sup>23</sup> Warren, *op. cit.*, 108-109.

Act provided that there be appointed "in each district a meet person learned in the law to act as attorney for the United States . . . to prosecute . . . all delinquents for crimes and offenses, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned." And, to enforce orders and process, the twenty-seventh section provided for a "marshal" in each district to execute "all lawful precepts directed to him, and issued under the authority of the United States."

The district attorneyships found precedent in the county attorneys and deputy attorneys general of colonial times. "Marshals" had been attached to colonial and state courts of admiralty,<sup>80</sup> which were replaced by the federal district courts. Earlier, seventeenth century America knew well officers called "marshal of the colony," "marshal general," or "provost marshal," and there had been deputy marshals and marshals for counties or judicial "ridings."<sup>81</sup> The colony of Georgia, which was not established until 1733, had a provost marshal as late as 1773. His duties included the service of writs and summonses, civil and criminal, the drawing of bail bonds, the custody of criminals, attendance upon juries, the execution of judgments, and a variety of related matters. These officers later gave way to the sheriff whom they resembled in duties,<sup>82</sup> and the marshals themselves had become almost exclusively court officers when the First Congress met.

The Constitution provided that the appointments of "Officers of the United States" should be made by the President "by and with the advice and consent of the Senate," except that Congress might vest the appointment of "inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments." The

<sup>80</sup> Virginia (1775), 9 Hen. Stat. 104; N. Y. (1777), 1 Laws of N. Y. (Jones & Varick), 11; N. H. (1776, 1787), 4 and 5 Laws of N. H., 27 and 229; Pa. (1778), 9 Pa. Stat. at Large, 277; see also Ga. Col. Rec., XIX, Pt. 1, 295, 388-390, 396; Wiener, *Notes on R. I. Admiralty*, 46 Harv. L. Rev. 44-72; and Hough, *Cases in Vice-Admiralty* (1925), xv, xix, 107.

<sup>81</sup> Conn. Col. Rec., 1689-1706, 143, 260; Charters & Gen. Laws of Mass., 1628-1779, 153 *et seq.*; N. C. Laws (Swann), 96; 1 Laws of N. H. (Province Period), 90; N. J. Archives (1st Series), I, 177-178; 1 Laws of N. H. (Province Period), 113; Duke of York's Laws in Pa. Charters & Laws, 1682-1700, 27, 50.

<sup>82</sup> Ga. Col. Rec., XIX, Pt. 1, 388-390; N. C. Laws (Swann), 96; Conn. Col. Rec., 1689-1706, 143.



Attorney General was not to be an "inferior Officer," and the Judiciary Act in its final form left the appointment of both the Attorney General and the district attorneys to the President and Senate.

"The selection of the fittest characters to expound the laws, and dispense justice, has been the invariable object of my anxious concern," wrote President Washington to Edmund Randolph. "I mean not to flatter when I say that considerations like these have ruled in the nomination of the attorney general of the United States, and that my private wishes would be highly gratified by your acceptance." "

Edmund Randolph possessed at thirty-six one of those fabulous records of public attainment which abound in late eighteenth century America—aide-de-camp to General Washington in 1775, member of the Virginia Convention of 1776 which advised the Continental Congress to declare independence, first attorney general of republican Virginia even as his refugee father had been the last King's attorney, mayor of Williamsburg, several times delegate to Congress, Governor of Virginia in 1786, member of the Annapolis Convention, delegate to the Federal Convention where he introduced the Virginia Plan and served on the committee of detail, an opponent of the Constitution with views so balanced that opposition became support when he came to believe the question one only of union or no union. Such, in brief review, was the career of the man whom George Washington invited to become the first Attorney General of the United States."

"His noble stature, his handsome face, his unfailing address, insensibly arrest the attention," said an observer in 1776. William Wirt, a discriminating commentator, reported of Randolph after he had grown portly that his features were "uncommonly fine; his dark eyes and his whole countenance lit up with an expression of the most conciliatory sensibility; his attitudes dignified and commanding; his gesture easy and graceful; his voice perfect harmony; and his whole manner that of an accomplished and engaging gentleman." "

Eloquence and address, however, were not his only qualifications.

" Sparks, *op. cit.*, X, 34.

" On Randolph, see Conway, *op. cit.*, and Anderson's shorter sketches in Dict. Am. Biog., XV, 353 and in *The American Secretaries of State* (Bemis, 1927), II.

" Hugh Blair Grigsby and William Wirt, quoted by Conway, *op. cit.*, 38.

Randolph knew the law, and this learning extended beyond the Anglo-Virginian field. His acquaintance with the duties of an attorney generalship extended back to earliest childhood. His uncle Peyton held the King's patent in 1753 when Edmund was born, and Peyton surrendered the post to Edmund's father, John, in 1766. Edmund himself served ten years as attorney general of Virginia. Small wonder that he could enter into an elaborate description of the powers and duties of his office when the Supreme Court of the United States challenged his right to proceed in an early case.<sup>22</sup> His temperament was judicious rather than partisan. For an office so important to the administration of justice this was a fortunate characteristic, though not one destined to make his road easy among those who saw in his delicately balanced judgments an indication of weakness and inconsistency.

Washington strongly desired the Virginian's assistance in the administration. Personal relations between the two men had been close since the siege of Boston, and Randolph had handled the President's personal legal business. But that Randolph would accept was not a foregone conclusion. His desire to complete his revision of a code of laws for Virginia, his feeling that he should remain for a time in the Virginia legislature, his anxiety for his wife's failing health, and finally his heavy financial obligations arising from a burden of inherited debt and unwise land speculation—all these, as he wrote Washington, were obstacles. True, wrote the President, the fifteen hundred dollar salary was low, but the prevailing belief was that the office would confer "preeminence" on its possessor and procure for him a "decided preference of professional employment." The obstacles were finally cleared away or disregarded, and Thomas Jefferson noted, as of December 14, 1789, that "E. Randolph is Atty. Genl. for the Supreme court & removes to New York the beginning of next month." <sup>23</sup>

<sup>22</sup> *Hayburn's Case*, 2 Dall. 409 (1792).

<sup>23</sup> Sparks, *op. cit.*, X, 27, 34; Conway, *op. cit.*, 129-130; Ford, *op. cit.*, V, 138.

## CHAPTER III

### "DISCREET LIBERALITY" AND THE FEDERALISTS

EDMUND RANDOLPH came just in time to participate in the opening ceremonies of the Supreme Court of the United States on February 2, 1790. There were no government cases. Few statutes were on the books. It was a time of planning rather than administration. The President's cabinet had as yet no existence.

In the absence of any considerable official business, the Attorney General was able to arrange an early journey to Williamsburg to bring his family to the capital at New York.<sup>1</sup> When he returned, he found that Congress had increased his official duties by putting him on the Patent Board with the Secretaries of State and War. Secretary Jefferson would summon Secretary of War Knox and Attorney General Randolph whenever an application for a patent came into the Department of State, and the three would examine it most critically. Soon the Attorney General's duties were further augmented by membership on the Sinking Fund Commission.<sup>2</sup>

There was still no Supreme Court business, and the requests for official opinions were few indeed.<sup>3</sup> Before the close of the year, however, the House of Representatives discharged the committee which was considering the judiciary and ordered the Attorney General to make recommendations for the better administration of justice. Randolph approached the task with industry and sent to the House an analysis of the defects in the existing system, a bill

<sup>1</sup> Conway, *op. cit.*, 133-135; Randolph to Madison, April 27, 1790, Madison Papers, Lib. Cong., XIII, 15; Madison to Randolph, May 6, 1790, *id.*, 23; Randolph to Madison, May 20, 1790, *id.*, 31.

<sup>2</sup> 1 Stat. 109, April 10, 1790; McMaster, *History of the People of the United States* (1883), II, 160; 1 Stat. 186, Aug. 12, 1790.

<sup>3</sup> See Randolph to Sec. Jefferson, Aug. 10, 1790, House Doc., VI, No. 123, 3, 26 Cong. 2 Sess. Before his coming, the government had resorted to the New York bar for legal opinions. See letter of Nov. 30, 1789, Hamilton, *Hamilton's Works* (1851), III, 544.

designed to effect suggested reforms, and a series of explanatory notes.<sup>4</sup>

His report criticized many features of the Judiciary Act of 1789, which was destined to exist with little permanent change until 1869 and was to be extolled, perhaps for that reason, by future historians. In 1790, however, there were those who termed it monstrous, defective in arrangement, obscurely drawn, and no more than an experiment. Randolph himself stated that time and practice alone could mature the judicial system.<sup>5</sup>

He had four major criticisms. The act did not clearly distinguish the jurisdiction vested exclusively in the United States courts from that shared jointly with the state courts. Moreover, he did not believe that the Supreme Court should entertain appeals from the highest state courts when they ruled against the federal government on federal questions.<sup>6</sup> Instead, said he, let either party to such a case in a state court remove it to a federal court for trial if he wished; the Supreme Court would then not exercise direct supervision over state supreme courts, and if parties should allow federal questions to be decided in state courts it would do no harm since the federal judges would not be bound.

Thirdly, the Supreme Court judges should not be required to hold trials in lower federal courts throughout the length and breadth of the land. They had too much to learn after their appointment in order to decide appeals. Moreover, how could they review their own decisions made on circuit?<sup>7</sup> Finally, Randolph suggested that the time might have arrived to prepare a code of law for the United States, to include the Constitution and federal statutes, the common law, and the law of the several states which might arise in the federal courts.<sup>8</sup>

Opinions of the report varied. Caleb Strong thought it better adapted to Virginia than to New England. The *National Gazette*

<sup>4</sup> Aug. 5, 1790, Ann. Cong., II, 1719; Am. St. Papers, Misc., I, 21-36, No. 17 and Ms. Record Bk., Reps. Atty. Gen., I, 4-139.

<sup>5</sup> Warren, *op. cit.*, 52; Beard, *Rise of American Civilization* (1927), I, 339; Am. St. Papers, Misc., I, 21.

<sup>6</sup> *Id.*, 23.

<sup>7</sup> *Id.*, 23-24.

<sup>8</sup> *Id.*, 25, 36; but see Randolph to Washington, Jan. 20 and 21, 1792, Washington Papers, Lib. Cong., CCLIII, 239, 244-245.

called it "an elegant piece of refinement" and bemoaned the fact that Congress had consigned it to oblivion. Justice Matthews, examining the report almost a century later, called it "an accurate and perspicuous analysis of the judicial power." The recommendation that Supreme Court justices be relieved of circuit court duty was to be fulfilled gradually, and the appeal to the Attorney General for a report on the judiciary furnished a precedent when problems of judicial administration arose.\*

Congress, however, became immersed in two new features of Secretary Hamilton's financial policy. The old federal debt already had been funded at par and the states' Revolutionary War debts had been assumed by the federal government. Congress was now invited to incorporate a United States bank and to raise funds to retire these debts by the levy of an excise tax upon distilled spirits.<sup>10</sup> After an easy passage through the Senate, the bank bill was denounced in the House as useless and unconstitutional. Foreseeing that the bill would surely pass, however, Washington called upon his Attorney General for an official opinion.<sup>11</sup>

Randolph turned to the Constitution. "That the power of creating corporations is not *expressly* given to Congress, is obvious," said he. To admit that such authority could be *implied* would beget a doctrine so indefinite as to grasp every power. Nor could Congress exercise authority merely because the states were "individually incompetent"—words which the Supreme Court was to echo a century and a half later and which even then came from the very man who had introduced into the Constitutional Convention and seen adopted

\* Warren, *op. cit.*, 54 and *The Supreme Court in United States History* (1922), I, 88; Conway, *op. cit.*, 143.

<sup>10</sup> 1 Stat. 138, Aug. 4, 1790; Hamilton's Reports of Dec. 13, 1790, Hamilton, *op. cit.*, III, 95, 106. Randolph had hoped for a land law which would augment his meager income. "With every frugality, almost bordering on meanness, I cannot live upon it, as it now stands," he wrote his friend Madison, the leading figure in the House. "I am a sort of mongrel between the States and the U. S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former, perhaps in a petty mayor's or county-court." Congress at this session increased his salary by \$400. Randolph to Madison, late 1790 or early 1791, Madison Papers, Lib. Cong., XIII, 88g; 1 Stat. 215, Mar. 3, 1791.

<sup>11</sup> Washington to Hamilton, Feb. 16, 1791, Hamilton, *op. cit.*, IV, 103; Opinion and supplementary letter, Clarke & Hall, *Legislative & Documentary History of the Bank of the United States* (1832), 86-91.

[illegible]

*Edm. Randolph,*

*Admission of the  
Attorney General of the United States*

[illegible]



a resolution empowering Congress "to legislate in all cases to which the separate States are incompetent."<sup>18</sup>

The preamble, he continued, should not be regarded as a source of power, for as such it would be "a full constitution of itself." True, the express powers to tax, to borrow money, to regulate commerce, and to make all laws necessary and proper to their execution were to be construed with "discreet liberality." He denounced a rule of literal strictness, because, he said, the Constitution was the product of compromise, not logic. The opinions of members of the Philadelphia convention (he had been a member of that body) and of the ratifying conventions, being either unknown or unauthoritative, should not guide construction.

Yet, even under the rule of discreet liberality, Congress had no power to incorporate a bank. The "necessary and proper" clause was among the surplusage "which as often appears from inattention as caution." While he was anxious that the federal power should not be dwarfed, he likewise dreaded extension of federal authority. If Congress could create a bank, then a similar construction on every specified federal power would stretch the arm of Congress "into the whole circle of State legislation." With Randolph's opinion against the bill in hand, Washington turned to Jefferson, who responded that he too deemed the bill unconstitutional.<sup>19</sup>

The bank charter was on the President's desk when he sent the views of both Randolph and Jefferson to Hamilton. To apply the doctrines of the Attorney General and the Secretary of State, replied Hamilton, would be fatal. Randolph's enumeration of detail was "so imperfect, as to authorize no conclusion" at all; moreover, he had failed to comprehend the whole nature of the banking function. Taking issue with Jefferson, who had maintained that "necessary and proper" meant absolutely essential, Hamilton declared that it meant no more than "needful, requisite, incidental, useful or conducive." If, said he, "the end be clearly comprehended within any of the

<sup>18</sup> Farrand, *Records of the Federal Convention* (1911), I, 21. This resolution became important in *Carter v. Carter Coal Co.*, 36 S. Ct. 855, 864-865 (1936). See the brief for petitioner Carter, 157, the brief for the government, 189, and Asst. Atty. Gen. Dickinson's argument, Sen. Doc. 197, 9, 74<sup>th</sup> Cong. 2 Sess.

<sup>19</sup> Feb. 15, 1791, Ford, *op. cit.*, V, 284-289.



specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely come within the compass of the national authority." Chief Justice Marshall was to paraphrase these words in the historic case of *McCulloch v. Maryland* twenty-eight years later.<sup>14</sup>

Randolph's arguments were thus met, and the issue between the Secretaries of State and the Treasury was sharply drawn. The President signed the bank bill, as Jefferson had advised him to do unless he was "tolerably clear" that the bill was unconstitutional.<sup>15</sup>

The bank controversy had initiated the first busy year for the nation's chief executive law officer. While no United States cases had come to the Supreme Court, Randolph's official opinions were much in demand. He advised Hamilton regarding the administration of the Funding Act and the Bank Act. To Secretary Knox he wrote that the United States had no legal title to Fort Pitt. Jefferson, anxious to prevent a private armed expedition from Kentucky into Indian territory to acquire and hold lands, learned from Randolph that the Kentuckians planned no crime. President Washington brought the Attorney General into a controversy between the governors of Virginia and Pennsylvania over the surrender of fugitives from justice.<sup>16</sup>

A bill to provide the apportionment of Representatives among the states passed the Congress early in 1792, and Attorney General Randolph and the department heads were asked for their opinions whether the measure conformed to the Constitution, which provided that Representatives should be apportioned among the states according to numbers but not to exceed one Representative for every thirty thousand of population. Congress had allotted each state as many Representatives as its population justified on the thirty thousand quotient, disregarding fractional remainders. Then, to bring the

<sup>14</sup> Feb. 23, 1791, Hamilton, *op. cit.*, IV, 104-138. *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819).

<sup>15</sup> Ford, *op. cit.*, V, 289.

<sup>16</sup> *Funding and bank*: Opinions of Feb. 1791, A. G. Ms.; Oct. 1, 1791, *ibid.*; Aug. 21, 1791, 1 Op. 17; Oct. 15, 1791, *id.*, 19. *Fort Pitt*: Randolph to Knox, Feb. 28, 1791, Washington Papers, Lib. Cong., CCXLIX, 513. *Kentucky expedition*: Jefferson to Dist. Atty., Ky., Mar. 22, 1791, Ford, *op. cit.*, V, 305; Randolph to Washington, Sept. 12, 1791, Washington Papers, Lib. Cong., CCLI. *Extradition*: Am. St. Papers, Misc., I, 38-43; 1 Stat. 302, Feb. 12, 1793.

House of Representatives to the full number justified by the national population, Congress gave the remaining seats to those states having the largest fractional remainders.

Randolph regarded the measure as definitely unconstitutional. The bill, said he, gave the states having the largest fractions more than one Representative to every thirty thousand. "What would the sensations of South Carolina be," he asked, "if her blacks should co-operate in giving a member to Connecticut?"<sup>17</sup> Jefferson wrote an elaborate opinion reaching the same conclusion, but Hamilton thought the measure valid because the Constitution was open to either construction. Knox approved the policy of the measure and thought it a very delicate matter for the President to decide a doubtful constitutional point against the sense of Congress.<sup>18</sup>

Washington hesitated, discussed the political angles of a veto with Jefferson, and had Randolph call Jefferson and Madison into conference. These three drew up a veto message. "You say you approve of this yourself?" Washington asked Randolph. "Yes, Sir," he replied, "I do upon my honor." The President sent it to the House of Representatives immediately. A few of the hottest friends of the bill expressed passion, wrote Jefferson, but the majority were satisfied, and both in Congress and out there were those pleased to see at last an exercise of the veto power.<sup>19</sup>

On March 31, 1792, a week before the veto of the reapportionment bill, Edmund Randolph had attended his first session of Washington's cabinet.<sup>20</sup> For the original meeting of the cabinet a year before, the President, who was absent on a southern tour, had designated the three department heads and the Vice President. Even before that, he had asked written advice from the department heads, the Vice President, and the Chief Justice.<sup>21</sup>

<sup>17</sup> Hamilton, *op. cit.*, IV, 209-213.

<sup>18</sup> Ford, *op. cit.*, V, 493-501; Hamilton, *op. cit.*, IV, 206-209, 215.

<sup>19</sup> Ford, *op. cit.*, I, 192; *id.*, V, 501; Richardson, *Messages and Papers of the Presidents* (1896), I, 124.

<sup>20</sup> Ford, *op. cit.*, I, 189.

<sup>21</sup> Washington to Jefferson, April 4, 1791, Sparks, *op. cit.*, X, 157. Jefferson's report of this meeting enumerated the Vice President and the Secretaries as attending. Ford, *op. cit.*, V, 320. When he prepared the *Anas*, Jefferson thought that he remembered that Randolph attended; in this his memory must have misled him. *Id.*, I, 165. Washington's requests for written advice from Chief Justice Jay have been regarded as some ground for believing that he "hesitated between the Chief Justice and the much humbler Attorney General." Hinsdale, *A History of the President's Cabinet* (1911), 16.

When he was preparing his second annual message, Washington had also invited Chief Justice Jay to make suggestions as to the judiciary or more general subjects. Randolph was immersed in preparing his report on the judiciary for the House of Representatives. There was nothing then surprising in a request to the highest judicial officer for suggestions as to the judiciary; in later years Jay and his associates on the Supreme Court made recommendations to Washington without solicitation."

Washington, however, did not utilize the Chief Justice as legal adviser to the executive. Jay was helpful on foreign policy, and it was in this capacity that Washington addressed him in common with the Secretaries and the Vice President when there was danger that the British would ask permission to march across American soil to attack Spain." Yet, when confronted with his first great constitutional problem, the bank question, Washington had turned to Randolph first.

However, for one reason or another, Randolph did not sit with the cabinet until 1792. Perhaps, as he had written Madison, "thrust out to get a livelihood" in the states, he was busy with private affairs. Perhaps the remembrance of royal attorneys general was still fresh. The Attorney General of England was not a member of the cabinet. But by 1792 Randolph's office had grown in importance, a movement initiated by himself was on foot to give him wide control over federal litigation and district attorneys," and the problems coming before the cabinet were increasingly tinged with questions of law. Moreover, with the birth of party politics, Randolph's participation in the cabinet was doubtless welcomed by Jefferson as a balance against the Hamilton-Knox combination and by the President because Randolph was less partisan and more cautious than either of the subsequently more renowned Secretaries.

While the Attorney General's influence in the affairs of state was growing, an action of the Supreme Court narrowed the potential

" Washington to Jay, Nov. 19, 1790, Johnston, *Jay's Correspondence* (1891), III, 409; Am. St. Papers, Misc., I, 51, 77.

" Washington's letter of Aug. 27, 1790, Sparks, *op. cit.*, X, 112-113, n.

" *Infra*, Ch. VIII, n. 1.

scope of his official authority over the administration of justice in the courts. The Pension Act of 1792 required the circuit courts to receive the applications of invalid veterans of the Revolutionary War and to certify to the Secretary of War their opinions on the applications.

The judges in all the circuits looked upon the Invalid Pension Act as unconstitutional because it conferred upon the courts a non-judicial function. Chief Justice Jay, Justice Cushing, and District Judge Duane, sitting as a federal circuit court in New York, modified the force of their opposition by deciding to pass upon the invalids' applications not as judges of the circuit court but as "commissioners." In Pennsylvania, Justices Wilson and Blair and District Judge Peters refused to act at all when the application of William Hayburn came before them.<sup>10</sup>

These decisions were variously received by the public and subjected to considerable discussion in Congress.<sup>11</sup> Attorney General Randolph went into the Supreme Court of the United States on August 8, 1792, prepared to move for a mandamus requiring the circuit court for Pennsylvania to proceed upon veteran William Hayburn's petition. In opening, Randolph made it clear that he was acting in his official capacity as Attorney General. He appeared for the United States, he said, with a view to procuring the execution of an act of Congress "particularly interesting to a meritorious and unfortunate class of citizens." The Chief Justice asked if this fell within the Attorney General's official powers.<sup>12</sup>

Randolph proceeded to give an elaborate description of the powers and duties of his office, in order to justify the proposed motion. The issue was whether it was part of the duty of the Attorney General of the United States "to superintend the decisions of the inferior courts, and if to him they appeared improper, to move the supreme court for a revision." Randolph, in support of his position, deemed his office analogous to that of the Attorney General

<sup>10</sup> Farrand, *First Hayburn's Case*, Am. Hist. Rev. (1908), XIII, 281-285; 1 Stat. 243, Mar. 23, 1792; *Hayburn's Case*, *supra*, at 411-412.

<sup>11</sup> For a summary of the reaction of the press see Warren, *op. cit.*, I, 72-77.

<sup>12</sup> 2 Dall. 409 (1792); Randolph to Madison, Aug. 12, 1792, Madison Papers, Lib. Cong., XV, 75.

of England. Second, the Judiciary Act gave him a general supervision over the "concerns" of the United States in the courts. Finally, he argued that the Attorney General was the appropriate arm of the executive to see, as the Constitution provided, that the laws be faithfully executed.

After discussion extending over several days, the Court was equally divided on the Attorney General's right, and Randolph did not make the motion.<sup>22</sup> It appeared that the justices opposed to the Attorney General believed that his English analogy was bad, that to bring *Hayburn's* case before them in this fashion on the ground that the United States was concerned in seeing justice done would enable the government to interfere in all manner of suits between private parties, and finally that the Attorney General must have formal authorization from the President to intervene in such a case.<sup>23</sup>

Randolph, having failed in his purpose to move *ex officio*, now made his motion as private counsel to Hayburn, "being resolved," he said, "that the court should hear what I thought the truth." After much consultation on the bench, it was agreed that the final decision should be made at the next court.<sup>24</sup> But the early revision of the Invalid Pension Act to avoid further difficulty in its administration made it unnecessary for the Court to decide *Hayburn's* case.

One question, however, was left in suspension. Were the veterans whose applications *had* been passed on by the circuit judges, sitting as commissioners, entitled to be placed upon the pension rolls? Congress directed the Secretary of War and the Attorney General to take steps to have this question determined in the Supreme Court. On August 6, 1793, Randolph again appeared to move *ex officio* for a mandamus to require the Secretary of War to place one of the pensioners on the pension list, but to no avail. Two of the judges thought that counsel for the pensioner, and not the Attorney General should appear; and Randolph, because he was unwilling to embarrass a great question "with little intrusions,"

<sup>22</sup> *Ibid.*, and 2 Dall. 409 differ on this point, the latter stating that a motion was made.

<sup>23</sup> Philadelphia *General Advertiser*, Aug. 16, 1792.

<sup>24</sup> Randolph to Madison, Aug. 12, 1792, Madison Papers, Lib. Cong., XV, 75.

waived the motion until some of the pensioners should engage private counsel.<sup>81</sup>

Until a few weeks after the Supreme Court had taken *Hayburn's* case under advisement, no serious problem of enforcing federal law occupied the Attorney General's time. Such a problem had been developing, however, from the day that Alexander Hamilton in his *Report on Public Credit* recommended a tax on distilled spirits.<sup>82</sup>

When Congress levied the tax, states adopted resolutions of protest and the people of western Pennsylvania talked resistance. "Distant from a permanent market, and separate from the eastern coast by mountains which render the communication difficult and almost impracticable," said a Pittsburgh petition, "we have no means of bringing the produce of our lands to sale either in grain or in meal. We are therefore distillers through necessity, not choice, that we may comprehend the greatest value in the smallest size and weight." Moreover, it continued, "our commerce is not, as on the eastern coast, carried on so much by absolute sale as by barter, and we believe it to be a fact that there is not among us a quantity of circulating cash sufficient for the payment of this duty alone."<sup>83</sup>

A series of meetings and resolutions against the tax was followed by acts of violence. Robert Johnson, excise collector in western Pennsylvania, was seized by an armed mob, shorn of his hair, stripped, tarred and feathered, robbed of horse and money, and left to travel on foot as best he could. The district court for Pennsylvania issued process against three of the mob. A cautious deputy rode out incognito to serve the writs, only to come back with word that had he attempted actual service he would have lost his life. An unsuspecting cowherd went next and suffered rough treatment. A demented man, imagining himself a collector, received the same discipline.<sup>84</sup> The President gave the unpopular statute several paragraphs in his annual

<sup>81</sup> 1 Stat. 324, Feb. 28, 1793; Randolph to Knox, Aug. 9, 1793, Am. St. Papers, Misc., I, 78.

<sup>82</sup> Report, Dec. 13, 1790, Hamilton, *op. cit.*, III, 95-105; Ann. Cong., II, 1842-1853, 1857-1861, 1870-1884; 1 Stat. 199, Mar. 3, 1791.

<sup>83</sup> Pittsburgh Petition, Aug. 1792, Adams, *Gallatin's Writings* (1879), I, 3-4. North Carolina, Virginia, and Maryland also adopted resolutions against the excise. McMaster, *op. cit.*, II, 42.

<sup>84</sup> Wharton, *State Trials* (1849), 105.

message. Hamilton made an extensive report on it, and Congress on May 8, 1792, reduced the tax on stills and their cheering product."<sup>1</sup>

These concessions were not enough. A western Pennsylvania mob compelled Captain Faulkner, who had rented an office to revenue inspector Neville, to renounce his deal as an alternative to being scalped, tarred, and feathered. A remonstrance to Congress was drawn at Pittsburgh, and it was also resolved to withdraw from revenue officers all friendship, trade, assistance, comforts of life, "and upon all occasions treat them with that contempt they deserve." County committees were appointed to call conferences among themselves and general meetings of the people and to correspond with similar committees in other parts of the United States."<sup>2</sup>

Alexander Hamilton wrote Washington at Mount Vernon that this called for vigorous and decisive measures. He sought to stiffen his own tax officers and asked Randolph whether an indictable offense had not been committed at Pittsburgh that might be brought to the attention of the circuit court at Yorktown. He wrote Chief Justice Jay about the spirit of opposition to the laws in western Pennsylvania and the expediency of the circuit court's "noticing" the state of affairs. He entertained no doubt, he wrote the Chief Justice, "that a high misdemeanor has been committed."<sup>3</sup>

Washington replied from Mount Vernon that he would approve action at Yorktown, if the Attorney General concurred. By this time Hamilton had received Randolph's opinion. The news from Pittsburgh was serious, said the Attorney General, and yet not strong enough to warrant judicial action. "To assemble, to remonstrate, and to invite others to assemble and remonstrate to the legislature," said he, "are among the rights of citizens."<sup>4</sup>

Hamilton finally convinced Randolph that the President should issue a proclamation against opposition to the law. The proclamation of September 15, 1792, plainly stated the President's intention

<sup>1</sup> Message of Oct. 25, 1791, Richardson, *op. cit.*, I, 105; Report on Spirits, Foreign, and Domestic, Mar. 5, 1792, Hamilton, *op. cit.*, III, 297-325; Act of May 8, 1791, 1 Stat. 267.

<sup>2</sup> Pa. Archives (2d Series; 1876), IV, 30, 31; Adams, *Gallatin's Writings* (1879), I, 3.

<sup>3</sup> Hamilton to Washington, Sept. 1, 1792, Hamilton, *op. cit.*, IV, 285; Hamilton to Jay, Sept. 3, 1792, Hamilton, *op. cit.*, V, 523.

<sup>4</sup> Sparks, *op. cit.*, X, 292-293; Hamilton, *op. cit.*, IV, 288-289.

to execute the laws, warned all persons combining to obstruct the enforcement of the excise, and charged all courts, officers, and magistrates to exert their powers to enforce the tax."<sup>40</sup>

Despite the Attorney General's opinion, Hamilton was determined that Randolph should attend the circuit court at Yorktown. Randolph finally agreed and the President so directed, in order that proceedings would be instituted only if well grounded, properly conducted, and given "a more solemn and serious aspect."<sup>41</sup> Little was achieved at Yorktown. Meager evidence had been collected by the supervisor of the revenue. Randolph and District Attorney Rawle prepared indictments against some of the men who had threatened to scalp Captain Faulkner, and the grand jury returned true bills. But the prosecutions were later abandoned when it was discovered that mistakes of identity had been made.<sup>42</sup>

A new three-point policy was then adopted by the government. Delinquents in cases in which there was clear non-compliance with the laws would be prosecuted. The produce of non-complying distilleries would be seized on the way to market, where that could be done without opposition. Purchases for the army would be confined to spirits on which the tax had been paid. The frank object of this plan was to avoid the use of force; and General Jonathan Wilkins wrote from Pittsburgh that, with this economic pressure, "I would pledge my head on the success of collecting the excise."<sup>43</sup>

After his return from Yorktown, Randolph's duties resumed their usual course. In February, 1793, he appeared in the Supreme Court to participate successfully as private counsel for the plaintiff in the famous private case of *Chisholm v. Georgia*. There, against prevailing opinion and Hamilton's contentions in *The Federalist*, he helped convince the justices that the states could be sued in the federal courts—a point which the people reversed by the Eleventh Amendment to the Constitution.<sup>44</sup> Within a few days after he completed his argument, he was drawn into the heated political struggle be-

<sup>40</sup> *Id.*, 289-291; Richardson, *op. cit.*, I, 124-125.

<sup>41</sup> Hamilton, *op. cit.*, IV, 317; Sparks, *op. cit.*, X, 305-306.

<sup>42</sup> Hamilton, *op. cit.*, IV, 588-589.

<sup>43</sup> *Id.*, 589; Ward, *The Insurrection of the Year 1794 in the Western Counties of Pennsylvania*, Memoirs of the Hist. Soc. of Pa. (1858), VI, 135, n. 1.

<sup>44</sup> 2 Dall. 419 (1793); *The Federalist*, No. 81.



tween Jefferson and Hamilton. Although Randolph had never wholly committed himself to either side, his general tendency was toward the Jeffersonian cause. He felt uppermost a deep loyalty to Washington, and held a sort of balance in the cabinet between the two rival secretaries.<sup>44</sup> Early in 1793, Jefferson, Madison, and Representative Giles of Virginia planned an attack upon Hamilton's administration of the Treasury, by showing that the Secretary had unlawfully caused to be loaned from the foreign fund to the domestic fund a large sum of money. This money, which Congress had earmarked for the payment of arrearages, installments, and residue of the foreign debt, had been deposited in the United States bank without authorization from the President.<sup>45</sup>

The French minister Ternant now sought a payment of three million livres upon the debt to France. Facing a famine, France proposed to purchase provisions in the United States. Washington naturally turned to his Secretary of State. Jefferson advised that the payment be made, that if adequate funds were not in the Treasury it was due to Hamilton's management of the two funds, and that the French ministry would shift the responsibility for famine upon the United States if the three million livres were not forthcoming.<sup>46</sup>

Washington's confidence in Randolph was never better demonstrated than when he confided these suggestions to him. The Attorney General replied with plain sincerity. This, said he, was an attack "tinctured with particular objects" and invited caution. For the President to interfere while Congress' own examination of the Treasury went forward would look like something more than neutrality between the parties; if the President should be dissatisfied with the outcome of this investigation, he could then submit the affair to Hamilton.<sup>47</sup>

Coming to the Ternant request, Randolph thought it perfectly proper to pay France what was already due, but hesitated over going

<sup>44</sup> Randolph to Washington, Aug. 5, 1792, Sparks, *op. cit.*, X, 512; see Hildreth, *History of the United States* (1856), IV, 354; Hamilton, *History of the Republic* (1860), V, 89 n.

<sup>45</sup> Ford, *op. cit.*, VI, 165-174; Bowers, *Jefferson and Hamilton* (1925), 190-203; 1 Stat. 138, Aug. 4, 1793.

<sup>46</sup> Memorandum of Feb. 12, 1793, Ford, *op. cit.*, VI, 174-179.

<sup>47</sup> Randolph to Washington, Feb. 14, 1793, Washington Papers, Lib. Cong., CCLVIII, 225.

further—for a reason which might have come more properly from the Secretary of State. France was at war. To pay what was due could never give just umbrage to the powers allied against her, but should an advance payment be made the allied nations might remonstrate. On the other hand, there was the threatened famine. To refuse might strain relations with France and be unpopular in the United States as well. "Upon the whole," said he, "I should be inclined to the advance, if it was easily within our reach." Some days later the cabinet voted to pay the whole sum asked, though Secretary Hamilton felt that the amount should not exceed the arrearages due.<sup>44</sup>

Some two months later, the cabinet was busy shaping the policy of the United States toward the great war which engulfed the continent of Europe and spread out over the seas. In December 1792, the newly established French Republic, confident in a series of victories over Austria and Prussia, had announced that it would treat as enemies "every people who, refusing liberty and equality or renouncing them, may wish to maintain, recall, or treat with a prince and the privileged classes." <sup>45</sup> In January, the ill-starred Louis XVI had been sent to the guillotine. To this act and the threat to spread the revolution, the governments of Great Britain, Spain, Holland, and Sardinia had given war as their answer.

Hostilities between Great Britain and France, which would most certainly be conducted to a great extent upon the sea, possessed major significance for North America. The conflict might easily involve the United States by virtue of treaty obligations to France. The Treaty of Alliance of 1778, in return for French aid in the struggle for independence, guaranteed to France her possessions in America. The Treaty of Amity and Commerce, concluded at the same time, gave the privateers of France certain privileges in American ports and excluded the enemies of France; and citizens of the United States who accepted commissions or letters of marque from any prince or state at war with France were to be regarded as pirates.<sup>46</sup>

<sup>44</sup> Ford, *op. cit.*, VI, 190.

<sup>45</sup> Hayes, *A Political and Social History of Modern Europe* (1916), 504.

<sup>46</sup> Treaty of Alliance, Feb. 6, 1778, Art. XI, 8 Stat. 10; Treaty of Amity and Commerce, Feb. 6, 1778, Art. XVII, *id.*, 22, 25.

Moreover, the survival of much anti-British feeling, founded upon a mixture of memory, prejudice, and grievance together with the strong pro-French trend of public opinion made some offensive act by citizens of the United States more than probable. The circumstances, therefore, demanded that the United States promptly adopt and firmly adhere to a policy insuring the peace essential to political and economic well-being.

To aid him in formulating such a policy, Washington on April 18, 1793, submitted questions to the members of his cabinet. Should the United States by proclamation prohibit citizens from interfering in the war, and if so, should there be a declaration of neutrality? Upon what terms, if at all, should the United States receive Edmond Charles Genêt, the minister-designate of the French republic who was on his way to replace the popular Ternant? What should be the attitude of the United States toward the Treaties of 1778; should they be renounced, regarded as suspended, or treated as applicable to defensive war only? If these treaties were to be in full force, how should their various clauses be interpreted? <sup>81</sup>

When the cabinet assembled the next day, all were agreed that the proper policy of the United States was neutrality. Jefferson at first opposed a proclamation, on grounds of constitutionality as well as expediency. Hamilton convincingly met Jefferson's argument on both points, and finally all agreed that neutrality should be proclaimed. On April 22, 1793, President Washington issued the great state paper later to be regarded as the foundation of the international law of neutrality. The duty and interest of the United States, read the proclamation, required that they should pursue an impartial conduct toward the belligerent powers. Not only would the United States refuse protection to their citizens engaging in the hostilities or trafficking in contraband, but officers of the law were directed to prosecute those who might violate the law of nations. <sup>82</sup>

Edmund Randolph had drawn the neutrality proclamation, al-

<sup>81</sup> Sparks, *op. cit.*, X, 533-534. Hamilton probably prepared these questions. Thomas, *American Neutrality in 1793* (1931), 26-28.

<sup>82</sup> Jefferson to Madison, June 23, 1793, Ford, *op. cit.*, VI, 315; Thomas, *op. cit.*, 38-40; Sparks, *op. cit.*, X, 534; Warren, *op. cit.*, I, 105; Richardson, *op. cit.*, I, 156-157.

though Chief Justice Jay, at Hamilton's request, had also prepared a draft. The proclamation omitted references to the right of nations to change their form of government, to the duty of the United States to deal with France through her *de facto* government, to American sympathy for the sufferings of Louis XVI, and to Almighty God. Jay had included all these. Neither draft used the word "neutrality," but Jay's spoke of "conduct strictly neutral and inoffensive." Jay omitted and Randolph included contraband. Jay would urge citizens to refrain from partisan public discussions and the press to present facts impartially and observe prudence in expression; Randolph made no mention of either point.<sup>88</sup>

The cabinet had decided that Genêt should be received, but Hamilton, extremely anxious to avoid the danger to peace which he saw lurking in the French treaties, desired to have Genêt informed that these covenants were reserved for future consideration. Jefferson and Randolph deemed the treaties valid, but, on Hamilton's promise to produce authority enabling the United States to void them, Randolph agreed to consider the point further. The Attorney General then suggested and the President approved taking opinions in writing.<sup>89</sup> Hamilton's written views skilfully supported his desire either to regard the treaties as suspended until the United States should learn the outcome of events or to treat them as inoperative in a war in which France was the aggressor. Jefferson's opinion was an equally capable refutation of these views.<sup>90</sup>

Randolph gave his opinion on May 6. To cancel or suspend the treaties would hazard a war with France and would be an admission of fear. "While despotism lasted," said he, "America thought herself bound." When the tincture of monarchy was suppressed, should America regard herself as free to renounce? The guarantee of French possessions in America, however, might involve the United States in the war. Neutral American bottoms, on the other hand, might

<sup>88</sup> Ford, *op. cit.*, VI, 316, 346; *Madison's Writings* (1865), I, 599; Hamilton, *op. cit.*, V, 235; Hamilton to Jay, April 9, 1793, Johnston, *op. cit.*, III, 473; Jay to Hamilton, April 1, 1793, *id.*, 473-477.

<sup>89</sup> Ford, *op. cit.*, I, 227.

<sup>90</sup> Hamilton, *Hamilton's Works* (1851), IV, 362-381, 382-390; Ford, *op. cit.*, VI, 219-231.

relieve France from famine. France herself would see that enforcement of the guarantee would convulse the United States, wound public credit, strike off essential trade, and give ground for malcontents at home to concentrate against the government. "In a word," said he, "the calamities of war are immeasurable." It might be humiliating to confess weakness, but it would be more hazardous to bicker with France over the legal question of suspending the treaties. "If we be faithful in executing every other stipulation in the treaty," he concluded, "France herself, impressed with the awfulness of our situation, will acquit us." <sup>86</sup>

Having received the views of his advisers, Washington decided—indeed he had never doubted—that as a general proposition the treaties were binding.<sup>87</sup>

Neutrality proclaimed was not neutrality enforced. Hamilton, as usual, took the initiative, suggesting that customs collectors be instructed to watch for violations of neutrality in their districts and report to him. Secretary of State Jefferson objected; not only would this set up a system of espionage destructive of the peace of society but it would transfer to the Treasury the conservation of laws of neutrality and peace with foreign nations. He proposed to intimate to the judges that they should charge grand juries with the enforcement of the neutrality laws; they, he thought, were the proper constitutional and public informers. But Randolph, Jefferson wrote Madison, "found out a hair to split, which, as always happens, became the decision." Hamilton was to write the collectors of the customs to convey their information to the district attorneys. Randolph was to direct the attorneys to receive the information and present it to the grand juries.<sup>88</sup>

Now in rapid sequence came a series of events which put neutrality to a stiff test. The French frigate *Embuscade*, which had brought Genêt to Charleston, South Carolina, captured the British merchantman *Grange* in the waters of Delaware Bay and brought her up to Philadelphia; the French privateersmen, which Genêt had

<sup>86</sup> Washington Papers, Lib. Cong., CCLX, 16-49.

<sup>87</sup> Ford, *op. cit.*, I, 227.

<sup>88</sup> Jefferson to Madison, May 13, 1793, *id.*, IV, 250; Randolph to Dist. Atty., R. I., May 12, 1793, Thomas Addis Emmet Mss., N. Y. Pub. Lib., No. 3677.

commissioned on reaching America, began to send prizes into American ports; and the French privateers themselves appeared in port. George Hammond, the indefatigable British minister, poured protests into the State Department.

Whether the capture of the *Grange* was legal depended of course upon the status of the waters of Delaware Bay. Randolph, to whom Jefferson turned for an opinion, ruled that the bay was United States territory; indeed the United States had by statute made it part of a revenue district. Otherwise similar bays, Chesapeake for instance, would become a rendezvous to all the world, without control by the United States; and it would require but another short step to disappropriate the mouths of important rivers. Buttressed by this opinion, Jefferson demanded the restitution of the *Grange*, and Genêt, who reached Philadelphia on May 16 after a triumphant overland progress northward, yielded to the "learned conclusions of the Attorney General." <sup>89</sup>

As the activity of French privateers produced more and more prizes, numerous problems forced themselves upon the cabinet. It was decided that the Treaty of Amity and Commerce, which prohibited the enemies of France from fitting out privateers in American ports, did not carry an implied permission to France herself to fit them out. Hamilton thought the prizes already taken should be restored to their owners in accordance with British minister Hammond's request, but Jefferson felt that the question of the lawfulness of the captures should be left to the courts. Randolph agreed that the appeal should be to the courts rather than to the President; but the United States should not, he warned, "become self-constituted into a tribunal for deciding the validity of prizes: a function which is utterly inadmissible to a neutral nation." <sup>90</sup>

In his cabinet opinion against the executive restitution of French prizes, Attorney General Randolph advised that, in justice to the powers aligned against France, citizens who assisted French privateers should be punished. Steps were taken to bring a test case into

<sup>89</sup> May 14, 1793, 1 Op. 32; Jefferson to Ternant, May 15, 1793, Am. St. Papers, Foreign Relations, I, 147; Genêt to Jefferson, May 27, 1793, *id.*, 150.

<sup>90</sup> Hamilton, *op. cit.*, IV, 394-406. See also Thomas, *op. cit.*, 109-117, 131 n.; *Findlay et al. v. The William*, Fed. Case. 4, 790 (June 1793); *Glass v. Sloop Betsey*, 3 Dall. 6 (Feb. 1794); Warren, *op. cit.*, I, 115.

court.<sup>61</sup> Gideon Henfield of Salem, Massachusetts, had sailed as a prize master on the French privateer *Citizen Genêt* and in that capacity had brought the British merchantman *William* into Philadelphia early in May. He was arrested on board the privateer. When Genêt protested that neither positive law nor treaty obligations sustained the arrest and attempted to throw the cloak of French citizenship about Henfield, Jefferson referred the question to Randolph.<sup>62</sup>

"Henfield is a citizen of the United States," the Attorney General answered, "and it is unusual at least, that a foreign Power should interfere." Moreover, treaties were the supreme law of the land, and treaties with three of the powers at war with France stipulated that there should be peace between their subjects and the citizens of the United States. Finally, at common law, Henfield's conduct was punishable as a disturbance of the peace of the United States.<sup>63</sup>

A special term of the circuit court met in Philadelphia on July 22, 1793, to try Henfield. The indictments which the grand jury returned on the 27th were based on one designed by Randolph with the advice of Hamilton. The actual prosecution was conducted by the district attorney and the Attorney General together. They maintained that Henfield had violated the positive law as expressed in treaties with The Netherlands, Prussia, and Great Britain, and also the law of nations, and that he was punishable even though there was no statute providing penalties. The defense that Henfield was covered by French nationality broke down in the face of positive testimony and the proposition that expatriation could not be used as a device for avoiding the penalty of the law.

Defense attorneys Peter Duponceau, Jared Ingersoll, and Thomas Sergeant argued that no crime was made out unless the President's neutrality proclamation created one; and, if the latter were true, Henfield could not be accused because he had joined the privateer before the proclamation. Justice Wilson charged the jury strongly against Henfield who, he said, had violated the law of nations and the

<sup>61</sup> Hamilton, *op. cit.*, IV, 403; correspondence between Jefferson and Dist. Atty. Rawle, May 15 and 17, 1793, Wharton, *op. cit.*, 51.

<sup>62</sup> See correspondence of June 1 between Genêt and Jefferson over Henfield and John Singleterry, arrested on a like charge, Am. St. Papers, For. Rel., I, 151, and the share that Randolph and Hamilton had in framing Jefferson's note, Ford, *op. cit.*, VI, 274.

<sup>63</sup> Opinion of May 30, 1793, Am. St. Papers, Foreign Relations, I, 152.

treaties. But the learned judge informed the jury that they must decide both the law and the facts, and Henfield was found *not guilty*.<sup>84</sup>

The administration had expended every effort to convict Henfield, with the full support of the judge. One of the jurors declared that Henfield's acquittal resulted from the jury's belief that the defendant would never have enlisted had he known of the proclamation. In the behavior of the Attorney General and the judge, the pro-French *National Gazette* had much to criticize and announced that thereafter American citizens might engage on French privateers "as it would be contrary to the principles of impartial justice that any man should in the future be convicted and punished for doing what in Gideon Henfield was no crime." <sup>85</sup>

"On the contrary," announced Randolph, "the court, with whom the law rests, most explicitly and unanimously declared that such conduct is in violation of our treaty with his Britannic majesty, and that the treaty is not only a law, the breach of which is criminal and punishable, but by the constitution, it is the supreme law of the land, more solemn, more obligatory than an act of Congress itself." The jury, said he, must have acquitted Henfield because of some deficiency of fact, or some equitable circumstances.<sup>86</sup>

Besides the prosecution of Henfield, neutrality presented multifarious questions in the summer of 1793. A series of eight rules governing the equipment of vessels by the belligerents in the ports of the United States was prepared by the cabinet. Genêt's conduct had become intolerable since he learned that neutrality, however unpopular with a large share of the people, was to be no one-sided affair; and it was decided to seek his recall. Likewise the suggestion for a special session of Congress was revived and abandoned when Hamilton, Knox, and Randolph opposed it.<sup>87</sup>

President Washington, beset by menacing problems of foreign

<sup>84</sup> Trial of Gideon Henfield, Wharton, *op. cit.*, 49-89.

<sup>85</sup> Philadelphia *National Gazette*, Aug. 3, 1793; Randolph to Washington, Aug. 21, 1793, Washington Papers, Lib. Cong., CCLXII, 162.

<sup>86</sup> Madison Papers, Lib. Cong., XVI, 54.

<sup>87</sup> Ford, *op. cit.*, I, 250-251; *id.*, VI, 358-362; Hamilton, *op. cit.*, IV, 455-456. Later Randolph advised Washington that he could not convene Congress elsewhere than at the capital even to protect members from yellow fever. Opinions, Oct. 24 and Nov. 2, 1793, Washington Papers, Lib. Cong., CCLXIII, 146-155, 301-302, see 1 Stat. 353, April 3, 1794.



relations and perplexed by the uncertain temper of the new judiciary, turned to the Supreme Court for advice. Jefferson had recommended it. Hamilton, though he had protested, framed twenty-nine questions. These Jefferson, at the direction of the President, transmitted to the justices with a letter explaining that the questions could not readily be brought before the trial courts. If the Supreme Court would speak, all parties would respect the answers and the executive would be protected against errors dangerous to the peace of the United States.

It was generally believed that the President could so seek the opinions of the justices on questions of law, though the pro-French press protested that lawyers were not needed to decide the plain language of the treaties. The justices replied directly to the President. The three departments of government—executive, legislative, and judicial—were checks upon one another; for the justices to answer the questions would be beyond the judicial power; the Constitution purposely, said they, seemed to place the giving of opinions in the executive department. While they regretted that they could not respond, they were consoled "from the reflection that your judgment will discern what is right, and that your usual prudence, decision and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States." \*\*

Thereupon, Jefferson proposed to set up a board to give such advice. Randolph maintained that any such agency should be annexed to the Attorney General's office. "In plain language," Jefferson wrote Madison, "this would be to make him the sole arbiter of the line of conduct for the U. S. towards foreign nations." \*\* The suggestion of the Secretary of State was dropped, and the Attorney General remained the sole legal adviser to the President and the executive departments.

Toward the close of the year 1793, when the cabinet was struggling over the portions of the President's annual message relating to neutrality and foreign affairs, Attorney General Randolph

\*\* Ford, *op. cit.*, VI, 351-354; Johnston, *op. cit.*, III, 487-489; Warren, *op. cit.*, I, 108-111, 112, 114-115.

\*\* Conway, *op. cit.*, 186, 191.

declared his intention to retire. The yellow fever epidemic in Philadelphia, he feared, would reduce his private law practice in the capital city. Jefferson, who had agreed to stay the year out, had rendered his resignation long before. This gave Washington an opportunity to continue Randolph among his advisers in the more remunerative capacity of Secretary of State, a position which Randolph accepted without suspicion of ill fate ahead.<sup>70</sup>

Washington chose as Randolph's successor William Bradford, a Pennsylvania supreme court judge, formerly state attorney general, a loyal Federalist, an able and experienced advocate, and a friend of criminal law reform. He had advanced at the bar with rapid progress. His reputation, said William Rawle, "never was defaced by petty artifices of practice, or ignoble associations of thought; his course was lofty as his mind was pure; his eloquence was of the best kind."<sup>71</sup>

One of the first tasks to be performed by the new Attorney General was the final settlement of the controversy over the Invalid Pension Act of 1792, which had been left undetermined the previous summer after Randolph's futile attempts to secure a decision from the Supreme Court. Yale Todd, one of the invalids upon whose petition the circuit judges had passed as commissioners, had been entered on the pension roll by the Secretary of War. Bradford brought in the Supreme Court a friendly action against Todd, to determine whether the judges had been validly authorized to approve his petition. The Court, without writing an opinion, now decided that federal judges could not act as commissioners.<sup>72</sup>

Midsummer brought the administration once more face to face

<sup>70</sup> Randolph to Washington, Nov. 10, 1793, Sparks, *op. cit.*, X, 386 n.; Jefferson to Madison, Nov. 17, 1793, Ford, *op. cit.*, VI, 450, and see I, 258; Randall, *Life of Thomas Jefferson* (1858), II, 175-180.

<sup>71</sup> Wallace, *William Bradford*, Am. L. J. (New Series; 1852), IV, 435. Bradford, born 1755, was a scion of a famous family of printers, a graduate of Princeton, and had served with ability in the Continental Army until his health failed. His report called "An Enquiry how far the punishment of death is necessary in Pennsylvania" was an able argument for a saner penal code than then existed and did much to expedite reform in Pennsylvania. He became Attorney General of the United States on Jan. 27, 1794, and died in office on Aug. 23, 1795. See Dict. Am. Biog. (1929), II, 566; and Griswold, *The Republican Court* (1864).

<sup>72</sup> Bradford to Knox, Feb. 17, 1794, Am. St. Papers, Misc., I, 78. The case appears in Taney's note in 13 How. 51 (1851). See also Sherman, *The Case of John Chandler v. The Secretary of War* (1905), 14 Yale L. J. 431-451.

with resistance to the whiskey excise. The plan to avoid force had been unsuccessful. Secretary Hamilton attributed this to the intimidation of revenue officers and to the fact that the law did not extend to the market northwest of the Ohio. Finally, in June 1794, Congress extended the law, gave the President full discretion to organize such enforcement machinery as he deemed necessary, and assigned to the state courts jurisdiction in civil cases arising more than fifty miles from the seat of a United States court.<sup>73</sup>

This last was a tactful move. From the outset Pennsylvania courts had dealt with rioters against federal revenue officers with moderate success. Governor Mifflin had enjoined the judges of the state supreme court to inculcate obedience to the acts of Congress, and he took pains to secure reports of all prosecutions for violent resistance. Alexander Addison, ex-Presbyterian minister and now state judge for western Pennsylvania, saw a particular need for vigorous action by the state courts. "I have long entertained an opinion," he wrote, "that the powers of the federal courts in the extent given them by the judicial laws of the Union are useless or dangerous. Useless, because the State courts are capable in a proper manner of discharging almost all their duties. Dangerous, because if they exercise their powers they must either destroy the essence of the trial by Jury, or swallow up the State courts. It is better to have them useless than dangerous."<sup>74</sup>

The Whiskey Insurrection broke out in western Pennsylvania before a practical test of state justice could be had. It was precipitated by the arrival of the United States marshal, David Lennox, to summon recalcitrant distillers to Philadelphia and to serve warrants upon two persons who had participated in a mob attack on a collector.<sup>75</sup>

On July 17, 1794, an armed force led by James McFarlane took forcible possession of the house of revenue inspector Neville, though it was guarded by federal troops. Marshal Lennox was seized and

<sup>73</sup> Report on Opposition to Internal Duties, Aug. 5, 1794, Hamilton, *op. cit.*, IV, 589, 590; 1 Stat. 378, June 5, 1794.

<sup>74</sup> Pa. Archives (2d Series; 1876), IV, 34-39.

<sup>75</sup> Hamilton's report of Aug. 5, 1794, Hamilton, *op. cit.*, IV, 592-599; Wharton, *op. cit.*, 110-117.

held prisoner until he promised to serve no more writs west of the Alleghenies. He and Neville fled down the Ohio and by a circuitous course found their way back to Philadelphia. Then came the robbery of the eastbound mail to intercept reports of the federal officers and to detect persons unsympathetic to the cause. An insurgent military force marched on Pittsburgh, where liquor rather than discretion diverted it from attack on the fort.

Meanwhile, President Washington prepared to send a formal mission to the western counties to explain his determination to enforce the laws and to offer pardon for all past violations. At the same time, he authorized steps to bring into operation the act of 1792, permitting the use of the militia to suppress insurrections. Before the militia was assembled, however, Attorney General Bradford recommended a proclamation laying the story before the people in order to secure the support of public opinion. The President's proclamation of August 7 canvassed the whole situation, stated the government's powers under the Militia Act, and warned the insurrectionists to disperse and their neighbors to give them no support."

The President's conciliation commission, consisting of Attorney General Bradford, United States Senator James Ross, and Jasper Yeates, all of Pennsylvania, was unsuccessful and finally reported to Washington that military force would be necessary. On September 25 the President issued a second proclamation announcing the failure of conciliation. The issue, he said, was whether a small portion of the United States should dictate to the whole Union; and he announced that the militia of New Jersey, Pennsylvania, Maryland, and Virginia was already on the way to the scene of the insurrection."

With the troops went Alexander Hamilton, District Attorney Rawle, and District Judge Richard Peters. "You are aware that the Judge cannot be controlled in his functions," wrote Hamilton to Governor Henry Lee of Virginia in command of the militia, "but I count on his disposition to co-operate in such a general plan as shall

<sup>78</sup> Act of May 2, 1792, 1 Stat. 264; Certificate of Aug. 4, 1794, Am. St. Papers, Misc., I, 85. *Proclamation*: Bradford to Washington, Aug. 1794, Washington Papers, Lib. Cong., CCLXVIII, 266-271; Randolph, letter of Aug. 5, 1794, Wharton, *op. cit.*, 156-159; Miffin, *id.*, 142-144; Richardson, *op. cit.*, I, 158-160.

<sup>79</sup> Am. St. Papers, Misc., I, 83-113; Richardson, *op. cit.*, 161-162.

appear to you consistent with the policy of the case." The district attorney was to have violators and insurgents arrested and jailed where there would be no danger of rescue—at Philadelphia for capital offenses and at York and Lancaster for misdemeanors—and to enforce penalties on delinquent distillers in the state courts, but he was to bring criminal proceedings in the federal courts."<sup>78</sup>

Suspects were summarily rounded up by the military, in accordance with an agreement between General Lee and District Attorney Rawle—a step, said Hamilton, founded upon the common law doctrine that every man may of right apprehend a traitor. "Accounts, too, have come down to us of shameful acts of cruelty done to the captives of 'the dreadful night,' " says the historian McMaster; "how they were pulled from their beds by the soldiers, cursed, beaten with scabbards, and dragged shoeless and half naked to damp cellars and barns; how they were driven like cattle through creeks when the water was waist high, and tied back to back at night like criminals or slaves." "<sup>79</sup>

The court had traveled with the army and the executive, that the three might combine to overwhelm the rugged countryside and mete speedy justice. Hamilton and Rawle conducted hearings before Judge Peters, and in the end eighteen prisoners were sent to Philadelphia. There the legal battle soon began. Some of the prisoners had been committed for high treason without preliminary hearing. When Judge Peters denied them bail, the Supreme Court of the United States reversed the district judge but required bond which the prisoners were unable to furnish."<sup>80</sup>

The prosecution began at the April term of the federal circuit court for Pennsylvania, District Attorney Rawle and Attorney General Bradford appearing for the United States. Many misdemeanor cases as well as those for high treason were submitted to a grand jury of respectable Federalists from Philadelphia and the neighborhood."<sup>81</sup>

<sup>78</sup> Hamilton to Gen. Lee, Oct. 20, 1794, Wharton, *op. cit.*, 160.

<sup>79</sup> Hamilton to Washington, Nov. 8, 1794, Hamilton, *op. cit.*, V, 51; McMaster, *op. cit.*, II, 203.

<sup>80</sup> *U. S. v. Hamilton*, 3 Dall. 17 (1795); Adams, *Life of Albert Gallatin* (1879), 148.

<sup>81</sup> Adams, *op. cit.*, 148.

Of those indicted for treason, only two, Philip Vigol and John Mitchell, were convicted. Albert Gallatin, former member of the Pennsylvania legislature, secretary of the Pittsburgh meeting which had petitioned Congress against the excise, Congressman-elect, and destined to become Secretary of the Treasury, had been a witness at the trial. "There is no doubt of the man being guilty in a legal sense," said Gallatin of Vigol, "but he is certainly an object of pity more than of punishment, at least when we consider that death is the punishment, for he is a rough, ignorant German." Gallatin attributed Mitchell's conviction less to the law than to his counsel who rejected as jurors all but Quakers, on the supposition that Quakers would condemn no person to death. "Brackenridge [a prominent citizen of western Pennsylvania] says that he would always choose a jury of Quakers, or at least Episcopalians, in all common cases, such as murder, rape, etc.," Gallatin wrote his wife, "but in every possible case of insurrection, rebellion, and treason, give him Presbyterians on the jury by all means." <sup>88</sup>

Justice Paterson sentenced Vigol and Mitchell to be hanged. Neither had been a leader in the insurrection. The leaders, wisely, either had escaped custody or had signed the submission before the militia arrived. Mitchell's pardon had been recommended months before, but the Attorney General had advised Washington to await the outcome of the trial. Vigol's jurors now signed a petition for a pardon, which Gallatin drew at their request. Finally, both were pardoned by the President. <sup>89</sup>

In July 1795, the British gave Secretary of the Treasury Wolcott a dispatch from French minister Fauchet to his government, said to have been intercepted at sea. From this curious document it might be inferred that Randolph, during the Whiskey Rebellion, had indiscreetly unburdened himself to Fauchet on the unsettled state of politics, the nation, and foreign relations. After Wolcott had consulted with Secretary of War Pickering and Attorney General Bradford, Washington was urged to return to Philadelphia without delay

<sup>88</sup> *Id.*, 149; *U. S. v. Vigol*, 2 Dall. 346 (1795); *U. S. v. Mitchell*, 2 Dall. 348 (1795); Gallatin to his wife, Adams, *op. cit.*, 149-150, and see 88-89.

<sup>89</sup> Washington to Gen. Morgan, Mar. 27, 1795, Sparks, *op. cit.*, XI, 25; Joint pardon of Nov. 2, 1795, *Pardons and Remissions* (State Dept.), 1, 9-10, and see 6, 16, 18, 23.

to receive information which could not be given save in person. Both England and France were pressing hard; and Washington was meditating whether to sign the bitterly opposed treaty with England, which Chief Justice Jay had negotiated and which the Federalist Senate had ratified. The President arrived, held the Fauchet letter for a week, then on July 19 summoned the Secretary of State. Randolph, abruptly shown the letter with cold formality in the presence of Wolcott and Pickering, was outraged. Convinced that he had been denied the ordinary courtesies of prompt information and a proper opportunity to explain, he resigned the same day, to return to Virginia where he speedily became a leader of the bar. Washington finally signed the British treaty.<sup>84</sup>

This incident was a great strain on Bradford. Depleted further by arduous nightly trips from Philadelphia to Oak Hill in New Jersey, the home of his father-in-law, Elias Boudinot, he was unable to resist a fever and died unexpectedly on August 23, 1795. Washington was compelled to seek a new Attorney General as well as a successor to Secretary Randolph. For the attorney generalship the President unhesitatingly turned to John Marshall of Virginia, whose support of the administration had been unswerving. Marshall declined to accept on the ground that he had undertaken business in Richmond which he could not abandon. Colonel James Innes of Virginia also refused, on grounds of health and finances. Washington considered several others and finally determined upon Charles Lee, brother of Governor "Light Horse Harry" Lee of Virginia.<sup>85</sup>

The thirty-seven-year old Virginian, then "arranging for a retired life" as a country gentleman, was a staunch Federalist whose support of the President had been vigorous. Washington had not, however, selected an outstanding figure to serve the remainder of the Federalist period, though Lee was a capable and honest lawyer.<sup>86</sup>

<sup>84</sup> Warren, *op. cit.*, I, 141; McMaster, *op. cit.*, II, 230-235; *The Vindication of Edmund Randolph* (Daniel, 1855); Griswold, *The Republican Court* (1864), 360-361; Whiteley, *Washington and His Aides-de-Camp* (1936).

<sup>85</sup> Bradford: Wallace, *op. cit.*, 439. Marshall: Sparks, *op. cit.*, XI, 62; Beveridge, *Life of Marshall* (1916), II, 123. Innes: Sparks, *op. cit.*, XI, 78; Hamilton, *op. cit.*, VI, 54; Washington to Carrington, Sept. 28, 1795, Washington Papers, Lib. Cong., CCLXXV, 176; Innes to Carrington, Oct. 30, 1795, *id.*, CCLXXVI, 233-234. Lee: Sparks, *op. cit.*, XI, 92-93; *Madison's Writings* (1865), II, 75.

<sup>86</sup> From 1789 to 1793 Lee had been United States Collector at the Port of Alexandria. Dkt. Am. Biog. (1933), XI, 101; Rives, *James Madison* (1868), III, 337; Chinard, *Honest John Adams* (1933), 261.

whom John Adams of Massachusetts, when he became President on March 4, 1797, retained as Attorney General.

Foreign affairs continued to absorb much time. Lee's opinions were concerned mainly with problems of neutrality and of French relations. After the famous X.Y.Z. affair—in which agents of Talleyrand sought \$250,000 from the American commissioners as a prerequisite to adjusting controversies between France and the United States—Lee advised a declaration of war, an embargo applicable to French vessels, the opening of the ports to British privateers, the revocation of the *exequaturs* of French consuls, an army large enough to seize New Orleans if Spain supported France, and the arming of American merchant ships."

Congress adopted a vigorous policy against France and made elaborate provisions for war. No war was formally declared, though Lee twice ruled in his opinions that the United States and France were not only engaged in an actual maritime war but that there existed a state of war authorized by both powers. When Napoleon became First Consul the way to friendly relations was opened, and with the conclusion of the Convention of Peace and Friendship on September 30, 1800, Charles Lee's *de jure* war ended."

On March 7, 1799, occurred an event reminiscent of the days of the whiskey rebellion. An armed mob led by John Fries, an auctioneer, attacked the United States marshal and his posse at Berthlehem, Pennsylvania, and released more than thirty prisoners who had resisted the efforts of assessors to perform their duties under the Direct Tax Act of 1798. This unpopular measure had greatly excited several of the eastern counties of Pennsylvania, and the attack on the marshal convinced the Adams administration that new treason was abroad."

Following a presidential proclamation, the militia went into the counties affected and rounded up many prisoners. The unfortunate Fries with two others, Frederick Heany and John Getman, was indicted for treason. A jury brought in a verdict of guilty, but when

" Adams, *Works of John Adams* (1853), VIII, 562-563 n.

" Lee to Sec. State, Aug. 21, 1798, 1 Op. 84; Lee to Dist. Atty., Va., Sept. 20, 1798, *id.*, 85. See *Bar v. Tingy*, 4 Dall. 37 (Aug. 1800); *Talbot v. Seeman*, 1 Cranch 1 (1801); *Gray v. U. S.*, 21 Ct. Cl. 340; 8 Stat. 178, Sept. 30, 1800.

" 1 Stat. 597, July 14, 1798.



sentence was about to be imposed defense counsel won a new trial on the ground that one juror had expressed views prior to the trial which indicated unreadiness to be guided by the evidence."<sup>90</sup>

Before a new trial could begin, many of the insurrectionists petitioned for pardons. Even before these petitions arrived, President Adams revealed concern whether actual treason had been committed and asked opinions. Lee wrote from Alexandria. Fries' was the second outbreak against law and order in Pennsylvania in a space of five years; an example should be made, and the law should be permitted to take its "due and impartial course." It was decided to await the outcome of the trials."<sup>91</sup>

In April 1800, Fries again underwent trial, this time without benefit of counsel, for his lawyers withdrew when Justice Chase let it be known that he would not entertain arguments on the theory of treason advanced by the defense. Fries, who declined to have counsel named by the court, was convicted and sentenced to be hanged. The same fate also awaited the two others."<sup>92</sup>

But John Adams was not ready to let these men hang. Again he appealed to his cabinet, and they gave him little comfort. Although he did not doubt his advisers' views were based on both integrity and humanity, the President differed and took upon himself alone the responsibility of one more appeal "to the humane and generous natures of the American people." The three were pardoned."<sup>93</sup>

In the enforcement of the troublesome Alien Laws of 1798, the Attorney General took no part. In one instance he was involved in a prosecution under the Sedition Act. On February 19, 1800, William Duane, the editor of the Philadelphia *Aurora* and one of the principal supporters of Jefferson, had published the text of a bill which he attacked as a device for stealing the approaching presidential election. After a long and futile effort to bring Duane to trial

<sup>90</sup> Wharton, *op. cit.*, 458-609.

<sup>91</sup> Adams, *op. cit.*, VIII, 648-649 n.; *id.*, IX, 15; Lee to Sec. Pickering, Sept. 2, 1799; Secs. Pickering, Wolcott, McHenry, and Stoddert to Adams, Sept. 7, 1799, Pickering to Adams, Sept. 9, 1799, *id.*, 21-23.

<sup>92</sup> Fries' second trial appears in Wharton, *op. cit.*, 610-648.

<sup>93</sup> Adams, *op. cit.*, IX, 59-61; *Pardons and Remissions* (State Dept.), 1794-1812, 32, 37, 39-40, 41-42; Richardson, *op. cit.*, I, 303-304.

at its own bar, the Senate on May 14 referred the whole matter to the President with the request that he instruct the proper law officers to prosecute Duane for the "false, defamatory, scandalous, and malicious publications" tending to defame and bring into disrepute the Senate of the United States. Adams instructed Lee and Rawle to prosecute; and this was begun but never completed.\*\*

While these events were transpiring Attorney General Lee was active in the Supreme Court, appearing first in the *Carriage Tax* case with Alexander Hamilton as his colleague. The proceeding was remarkable in that the government employed the counsel on both sides, fictitious "facts"—that the defendant "kept one hundred and twenty-five chariots"—were agreed upon to give the Supreme Court jurisdiction, and the Court for the first time discussed the constitutionality of a statute. The justices agreed that the tax was valid. "It is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of Congress void," said Justice Chase, "but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case." Said Justice Patterson, "the constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise." He concluded his discourse "with reading a passage or two from Smith's *Wealth of Nations*." \*\*

The scattered and often inconclusively settled legal questions of the Federalists were to recur in different forms in the course of a hundred years or more. Aside from his court and cabinet duties, the Attorney General continued in his important advisory relationship to Congress regarding judiciary and legal problems. Congress had adopted the schedule of fees used in each state as the measure of the compensation for federal judicial officers until a uniform fee bill

\*\* Alien Acts of June 25 and July 6, 1798, 1 Stat. 570, 577; Sedition Act of July 14, 1798, *id.*, 596; Anderson, *The Enforcement of the Alien and Sedition Laws*, Ann. Rep. Am. Hist. Assn. (1912), 113; Wharton, *op. cit.* Duane: Am. St. Papers, Misc., I, 208-210, 211-213, 215; Sen. Res., Ann. Cong., X, 184; Adams, *op. cit.*, IX, 56.

\*\* *Hylton v. U. S.*, 3 Dall. 171 (Feb. 1796); Am. St. Papers, Misc., I, 393; *Madison's Writings* (1865), II, 77, 81, 84, 87.

could be adopted for the whole country. The task of working out such a measure had been delegated to Attorney General Bradford, and both Bradford and Lee made important recommendations. Yet, as with Randolph's report on the judiciary, a century was to pass before Congress got around to substantial reforms." The misconduct of a territorial judge was another matter referred to Lee." Most congressional requests for the Attorney General's advice, however, concerned the validity of money claims of private parties against the government."

With the turn of the century, a beginning in the organization of federal justice had been made. The cabinet, however, had wrecked itself in party schemes and feuds. Adams appointed John Marshall of Virginia to be Secretary of War. Marshall promptly declined, only to answer reluctantly Adams' next call to serve as Secretary of State. There, as head of the cabinet, he managed the government for a grateful President who immediately hastened to his afflicted wife in Massachusetts.

It was Marshall's unhappy fate to witness the eclipse of the party of Washington and Hamilton and Adams. "There is a tide in the affairs of nations, of parties, and of individuals," wrote Secretary of State Marshall. "I fear that of real Americanism is on the ebb." Jefferson and his Republicans were at the gates, bearing, in the eyes of the Federalists, anarchy and the revolutionary doctrines of France. "To Mr. Jefferson," Marshall wrote Hamilton, "I have felt almost insuperable objections." "

A few weeks before the Federalists surrendered the Presidency forever, Adams unexpectedly named Marshall to preside over the judiciary. The nomination of the new Chief Justice was confirmed by the last Federalist Senate. Even the Republicans felt that a lesser

" Am. St. Papers, Misc., I, 82, 117-122, 152; Joint Res., June 9, 1794, 1 Stat. 402; Lee to Washington, April 22, 1796, Washington Papers, Lib. Cong., CCLXXVIII, 329-330; Ann. Cong., III, 809; *id.*, V, 76, 81, 82, 84, 85, 1227-1228, 1460.

" Am. St. Papers, Misc., I, 151-152, 157.

" *Randolph on Jackson's claim as district attorney*: Ms. Record Bk., Reps. Atty. Gen., I, 140-142. *Lee on relief of imprisoned debtors*: Am. St. Papers, Misc., I, 138, 160. *Lee on relief of a marshal*: Ms. Record Bk., Reps. Atty. Gen., I, 411. *Lee on claims to land or pensions*: *Id.*, 180-182, 188-192. *Scioto land scandal*: Am. St. Papers, Public Lands, I, 23-24. *Lee on Ohio and Georgia lands*: Am. St. Papers, Public Lands, I, 59, 60; Ms. Record Bk., Reps. Atty. Gen., I, 192-410.

" *Beveridge, op. cit.*, II, Ch. XII, particularly at 514-515, 537, 553.

Federalist luminary had been merely retired to a life of legal meditation in the innocuous recesses of the Supreme Court. But Chief Justice Marshall was to hold office for a third of a century, a great protagonist destined to build a judicial eminence from which to survey the ebb and flow of many parties and many causes.

## CHAPTER IV

### THE TROUBLED NEW WORLD

At midnight, March 3, 1801, the Presidency of John Adams ended. At that very moment, according to legend more entertaining than true, John Marshall, Chief Justice of the United States who had continued also to serve as Adams' Secretary of State, heard the voice of Levi Lincoln command him to cease the nefarious work of commissioning the "midnight judges" whose appointments had been rushed through in the last hours of Federalist rule.<sup>1</sup> Closing hours they were indeed, for the Federalists were to eke out their remaining years as a dwindling minority.

Lincoln, the first important party leader to become Attorney General, came from Massachusetts, where he had long actively supported the Republicans. Rescued for the law after an early apprenticeship to a blacksmith, he had served in various public offices, both legislative and judicial, and had helped draft the Massachusetts constitution of 1780. "Mr. Lincoln is a good lawyer, a fine scholar, a man of great discretion and sound judgment, and of the mildest and most amiable manners," said Albert Gallatin, the new Secretary of the Treasury. "He has never, I should think from his manners, been out of his own State or mixed much with the world except on business." As a lawyer, Lincoln's greatest achievement had come in 1781 when he and Caleb Strong helped convince the Massachusetts supreme judicial court that slavery was unconstitutional in Massachusetts. "He was not deemed a profound common lawyer; but was there ever a profound common lawyer known in one of the Eastern States?" asked Jefferson many years later. "There never was nor never can be, one from those States."<sup>2</sup>

<sup>1</sup> For the story and a refutation see Beveridge, *op. cit.*, II, 561-562.

<sup>2</sup> Adams, *Life of Albert Gallatin* (1879), 276; Adams, *Gallatin's Writings* (1879), I, 493. Lincoln (1749-1820) graduated from Harvard, 1772, studied law in Newburyport and Northampton, served in the Revolutionary War, and practiced law at Worcester where he resided the rest of his life. President Madison in 1811 appointed him an associate justice of the Supreme Court, a post which he declined because of failing eyesight. *Dict. Am. Biog.* (1933), XI, 262-264.

The new administration recognized that to win control of the judiciary, so solidly placed in Federalist hands through the appointment of judges, would prove far more difficult than had been the capture of the Presidency and Congress. While Jefferson disapproved any general dismissal of government officers for partisan reasons, he felt something should be done. "The courts being so decidedly federal and irremovable," he wrote, "it is believed that republican attorneys and marshals, being the doors of entrance into the courts, are indispensably necessary as a shield to the republican part of our fellow-citizens." \*

In addition to changing these officers, the Judiciary Act of 1801 could be repealed. It had been passed in the last month of Adams' administration and achieved one great reform in the judicial system for which Attorney General Randolph and the justices of the Supreme Court had contended. The justices were relieved of circuit court duty; six circuits were created, each with its own new circuit judges.<sup>4</sup> At the end of his administration, Adams had so utilized his appointing power that these posts, with all the subordinate places which necessarily accompanied them, had been filled with Federalists—a circumstance which diverted attention from the substantial reform which the measure achieved to the sordid partisan end which it also served. Among the Federalist beneficiaries to receive circuit judgeships was Attorney General Lee.<sup>5</sup>

The Jefferson administration's move to repeal this measure was led in the Senate by John Breckinridge of Kentucky. This excellent lawyer and forceful speaker possessed "a graceful and conciliating manner." Abandoning the prospect of a brilliant career in his native Virginia, Breckinridge had won quick prominence in Kentucky, serving as attorney general there in 1795. He was speaker of the lower house of the state legislature, and, after one unsuccessful attempt, was elected United States Senator in 1801. He came to Washington

\* Jefferson to Giles, Mar. 23, 1801, Lipscomb & Bergh, *Writings of Jefferson* (1904), X, 238-239. On April 8, 1801, Jefferson wrote Archibald Stuart that Republican district attorneys and marshals were the only shield "against the federalism of the courts," *id.*, 257.

<sup>4</sup> Act of Feb. 13, 1801, 2 Stat. 89; repealed by Act of Mar. 8, 1802, *id.*, 132.

<sup>5</sup> On Lee's appointment to a judgeship, Adams nominated Theophilus Parsons of Massachusetts to be Attorney General, Feb. 18, 1801. Parsons, however, declined to serve. Langelutrig, *The Department of Justice* (1927), 260, n. 1.

deeply interested in the development of the West. In Kentucky he had sponsored the famous Kentucky Resolutions of 1798 which declared the states themselves arbiters of federal constitutional questions.\*

Against the Judiciary Act of 1801, Breckinridge waged a successful fight, covering in the course of the debate two important constitutional questions. First, he denied that the judges appointed in pursuance of the act would continue to be judges if the act should be repealed. "Because the Constitution declares that a judge shall hold his office during good behaviour, can it be tortured to mean, that he shall hold his office after it is abolished?" he asked. "Can it mean, that his tenure should be limited by behaving well in an office which did not exist?" There was another reason. "It is a principle of our Constitution, as well as of common honesty, that no man shall receive public money but in consideration of public services," he declared. "Sinecure offices, therefore, are not permitted by our laws." †

Second, he denied that the Constitution granted the courts power of review over acts of Congress, and he warned of the dangers of a doctrine which would give supreme power to an irresponsible tribunal. "Is it not truly astonishing that the Constitution, in its abundant care to define the powers of each department, should have omitted so important a power as that of the courts to nullify all the acts of Congress, which, in their opinion, were contrary to the Constitution?" he asked again. "Once admit the doctrine, that judges are to be indulged in these astute and wire-drawn constructions, to enlarge their own power, and control that of others, and I will join gentlemen of the opposition, in declaring that the Constitution is in danger." ‡

The repeal of the Judiciary Act on March 8, 1802, did not end the battle over the midnight judgeships. In 1803 both the House and the Senate defeated proposals for a test case. § Then the Supreme Court decided the case of *Marbury v. Madison*. The suit was filed, as the

\* Bowers, *Jefferson in Power* (1936), 116; Dict. Am. Biog. (1929), III, 6.

† Jan. 8, 1802, Ann. Cong., XI, 28.

‡ Feb. 3, 1802, *id.*, 179.

§ House debate, Jan. 27, 1803, Ann Cong., XII, 427-441; Sen. debate, Feb. 3, 1803, *id.*, 51-78.

Judiciary Act provided, in the Supreme Court rather than in a trial court. The question was whether certain persons whom Adams had appointed justices of the peace in the District of Columbia might compel Secretary of State Madison to deliver their commissions, completed but undelivered when Jefferson had succeeded to the Presidency. Attorney General Lincoln appeared in the case not as counsel for Madison, for the administration had no intention of arguing the case with John Marshall who had made out the disputed commissions, but as a witness. In response to written questions propounded by former Attorney General Lee, he testified that there had been some commissions in the office of the Secretary of State when he temporarily took it over but whether they were the commissions of the petitioners for the mandamus he could not say. "This great man," said a Federalist newspaper, "was asked a simple question, but could not answer it until they gave it to him in writing, and he went off and spent a whole day and night with it . . . and then made out to remember that he had forgotten all about it."<sup>10</sup>

Chief Justice Marshall wrote the opinion. After a long dissertation to show that Marbury was entitled to his commission, the justices concluded that the Judiciary Act of 1789 had unconstitutionally added to the court's original jurisdiction; therefore, Marbury had no such remedy as he sought. At the small price of the power to issue the writ of mandamus in original proceedings, the Supreme Court for the first time held an act of Congress unconstitutional.<sup>11</sup>

The "midnight judges" had lost their fight. The Jeffersonians advanced to the attack with impeachments against District Judge John Pickering of New Hampshire, who was found guilty, and Associate Justice Samuel Chase, who was found not guilty. In both of these cases Caesar Augustus Rodney served as one of the managers for the House of Representatives. A lawyer from Wilmington, Delaware, and a master of juries, Rodney possessed fluency, elegance in diction, readiness to illuminate the law with poesy, and a talent for pathos. The power and beauty of his speech made men forget

<sup>10</sup> *Washington Federalist*, Feb. 23, 1803.

<sup>11</sup> *Marbury v. Madison*, 1 Cranch 137 (1803).



his ludicrously ill-fitting "shad-belly" coats. Jefferson watched him with an eye to the future.<sup>13</sup>

While the struggle over the judiciary was bringing two of his successors to the fore, Attorney General Lincoln worked harmoniously in Jefferson's official family. None of his few Supreme Court cases was of permanent importance,<sup>14</sup> but some of his letters of advice and his opinions to the President reflected the great legal problems of the time. Of these, none surpassed the question of territorial expansion. Louisiana, the vast land beyond the Mississippi, was not yet regarded as important; but possession of New Orleans and the mouth of the river was recognized as essential to the national welfare. Lincoln, like Jefferson, felt grave doubts as to the constitutional authority of the United States to acquire new territory. He hit upon an ingenious method of avoiding both constitutional and political obstacles, by extending existing territory to its "natural" boundaries. "The idea is," Lincoln wrote Jefferson, "that for the common advantage of having great, fixed, and natural boundaries between the territory of France and of the United States, and to secure to the latter, the full and unimpeded enjoyment of the navigation, maritime & commercial rights important, and naturally appurtenant to a country bordering on navigable rivers in the neighborhood of a sea coast, and from the interior of which country, navigable rivers empty themselves into a neighboring sea, France agrees to extend the boundaries of the Mississippi Territory, and of the State of Georgia."<sup>15</sup>

When Jefferson sent this letter to the Secretary of the Treasury, Gallatin replied that he could see no difference between a power to "acquire" territory for the United States and the power "to extend by treaty the territory" of the United States. He believed that the constitutional difficulty really did not exist, for the United States as a nation possessed an inherent power to acquire territory. Lin-

<sup>13</sup> Read, *Sketch of Caesar Augustus Rodney* (1853); Dict. Am. Biog. (1935), XVI, 82.

<sup>14</sup> *U. S. v. Hooe*, 1 Cranch 318 (1803); *Pennington v. Cox*, 2 Cranch 33 (1804), interesting because the issue was feigned; *Adams qui tam v. Woods*, *id.*, 336. In various other cases, the United States was represented by district attorneys acting as special counsel.

<sup>15</sup> Lincoln to Jefferson, Jan. 10, 1803, Jefferson Papers, Lib. Cong., CXXVIII, 22189-90.

coln, on the other hand, feared that unless his *method* were followed some future executive might purchase Louisiana, and even go further south and "become the Executive of the United States of North and South America."<sup>18</sup> Less than three months later the United States purchased the whole of Louisiana.

In the light of Lincoln's attitude toward the acquisition of territory, it is not surprising that he went out of his way in an opinion to condemn the Bank of the United States as of "deadly hostility" to the principles and form of the Constitution. "The nation is, at this time, so strong and united in its sentiments, that it cannot be shaken at this moment," he wrote to Gallatin. "But suppose a series of untoward events should occur, sufficient to bring into doubt the competency of a republican government to meet a crisis of great danger, or to unhinge the confidence of the people in the public functionaries; an institution like this, penetrating by its branches every part of the Union, acting by command and in phalanx, may, in a critical moment, upset the government." No government, he thought, was safe under the "vassalage of any self-constituted authorities" or any other authority than that of the nation. "What an obstruction could not this bank of the United States, with all its branch banks, be in time of war!" he exclaimed. "It might dictate to us the peace we should accept, or withdraw its aids. Ought we then to give further growth to an institution so powerful, so hostile?"<sup>19</sup>

In the fall of 1804, Jefferson secured from Lincoln an elaborate classification of the various offenses at the time being committed by the British navy against the United States. The impressment of seamen from American ships Lincoln condemned as a violation of neutral rights. Even though England denied the right of expatriation to her subjects, free ships should make free men. The virtual blockade of New York by a British squadron, including the notorious *Leander*, which operated both within and beyond the three-mile limit, Lincoln denounced as a violation of the neutrality and territorial sovereignty of the United States. Not only had international

<sup>18</sup> Gallatin to Jefferson, Jan. 13, 1803, Adams, *op. cit.*, I, 111, 113; Lincoln to Jefferson, Jan. 10, 1803, Jefferson Papers, Lib. Cong., CXXVIII, 22189-90.

<sup>19</sup> Lincoln to Gallatin, Dec. 13, 1803, Lipscomb & Bergh, *op. cit.*, X, 436-439.

law been disregarded by this squadron, but also in preventing both federal and state officers from boarding a British merchantman in New York harbor, in preventing the United States marshal from serving a writ upon a British officer on one of the warships, and in refusing to obey the government's order that a French merchantman be allowed a twenty-four hour lead before pursuit from neutral waters, the British had violated the positive laws and usages of the United States. He made, however, no specific recommendation. The President had already mentioned the matter in his annual message and had assured Congress that he believed diplomatic protest would succeed. In this he was to be disappointed.<sup>17</sup>

Late in 1804, after the reelection of Jefferson was assured, Attorney General Lincoln regretfully tendered his resignation. These had been troubled years, marked not by the ordinary processes of justice but by consolidation of the forces of national life and by planning for a national future. "I shall be able to repel from past personal observations, and the knowledge of facts, the volumes of abuse & falsehood which have disturbed our Govt. & disgraced our country," wrote the departing Attorney General to his President. "With a devotedness to the republican principles of our federal Govt; with an unspoken confidence in those to whom its administration was committed, with a veneration for civil & religious liberty, truth & justice; with an honest wish for the prosperity of our Country, & to be useful in it, I came into office, with these qualifications, I shall leave it to a successor possessing, probably, a greater quickness of conception, & readiness of recollection, than *usually* remain to the *first stages of declining age*." Jefferson replied with feeling. "I am a father and have been a husband," said the President. "I know the sacred duties which these relations impose, the feelings they inspire, & that they are not to be resisted by a warm heart. I yield therefore to your will."<sup>18</sup>

When Jefferson turned to the "painful task" of finding Lincoln's

<sup>17</sup> Lincoln to Jefferson, Nov. 13, 1804, Jefferson Papers, Lib. Cong., CXLIV, 25136; Message of Nov. 8, 1804, Richardson, *op. cit.*, I, 369; Proclamations of May 3, 1806, *re* the vessels off New York, and July 2, 1807, *re* Leopard-Chesapeake affair, *id.*, 402, 422; McMaster, *op. cit.*, III, 236-239.

<sup>18</sup> Lincoln to Jefferson, Dec. 26, 1804, Jefferson Papers, Lib. Cong., CXLV, 25331-2; Jefferson to Lincoln, Dec. 28, 1804, *id.*, No. 25337.

successor, he made slow progress. William Levy and Mahlon Dickerson of Philadelphia were seriously considered. In the northern states few Republican lawyers, in Secretary Gallatin's opinion, were equal to the place. All the other cabinet officers made recommendations. Secretary of the Navy Smith tendered himself for the post. "My education and the habits of my life have given me a strong passion and a high taste for law disquisitions," said he. "And I have not yet been able to acquire a taste for the details of the Navy Department." Jefferson took Smith's offer in good part and appointed him. When, however, Jacob Crowninshield declined to serve as Secretary of the Navy, Smith remained in the Navy Department. Next Jefferson tendered the post to John Julius Pringle, a lawyer trained in England and long attorney general of South Carolina. As usual the opportunity for private practice was held forth as an inducement. "The practice in the Supreme court," Jefferson wrote, "& the district courts of Columbia held here & at Alexandria is said to be easy & profitable." When Pringle was not to be tempted, Jefferson turned to Senator Breckinridge, who accepted. His departure from the Senate, however, greatly weakened the administration there.<sup>1\*</sup>

Breckinridge's greatest services to the administration had already been performed. He seldom represented the United States in the Supreme Court and wrote few opinions. Indeed his absence from Washington proved embarrassing to Jefferson, especially on the occasion when for the first time a writ of injunction was asked to prevent the collection of a tax. A year and a half later, in December 1806, Breckinridge died and Jefferson urgently invited Caesar Augustus Rodney to become Attorney General. Flattered, Rodney accepted and hurried to Washington.<sup>2\*</sup>

The new Attorney General soon found himself playing an im-

<sup>1\*</sup> Adams, *op. cit.*, I, 208-209, 219; Smith to Jefferson, Jan. 2, 1805, Jefferson Papers, Lib. Cong.; Jefferson to Smith, Jan. 3, 1805, *id.*, 25423; Jefferson to Senate, Mar. 2, 1805, *id.*, CXLVII, 25696; Smith's nomination had been confirmed and his commission issued, Langeluttig, *op. cit.*, 260, n. 1; Jefferson to Pringle, June 15, 1805, Jefferson Papers, Lib. Cong., CL, 26217; Jefferson to Breckinridge, Aug. 7, 1805, *id.*, CLI, 26473; Bowers, *op. cit.*, 298-299.

<sup>2\*</sup> Adams, *op. cit.*, I, 289, 327-328; Jefferson to the Senate, Jan. 15, 1807, Jefferson Papers, Lib. Cong., CLXIV, 28802; Ford, *Jefferson's Writings* (1895), IX, 12; Rodney to Jefferson, Jan. 19, 1807, Jefferson Papers, Lib. Cong., CLXIV, 28829.

portant part in the attempt to unravel one of the most mysterious incidents in American history, the Burr conspiracy. Whether the former Vice President of the United States, who had so recently presided over two solemn courts of impeachment, actually blazed a "Trail of Treason," whether he planned to wrest Louisiana from the Union or merely planned an unlawful expedition against Spanish Mexico, or whether he simply intended to set up a colony on the Bastrop lands in Louisiana remains to this day a subject upon which informed and reasonable persons differ.<sup>21</sup>

Early in November 1806, District Attorney Davies of Kentucky had attempted to prosecute Burr's scheme as a design to attack Spanish territory, but Burr aided by his counsel, Henry Clay, successfully thwarted the move. Soon afterward the President became convinced that the matter was serious. He issued a proclamation forewarning all persons of a plot to attack Spain and ordering all to aid in preventing it. On January 22, 1807, Jefferson reported the whole affair to Congress.<sup>22</sup>

About this time Dr. Erich Bollman and Samuel Swartwout, two of the several prisoners taken by General James Wilkinson in New Orleans, reached the capital. These two had served Burr as messengers. An aroused President determined that they should be committed on charges of treason in levying war against the United States. For this purpose Attorney General Rodney and District Attorney Jones labored earnestly in the circuit court of the District of Columbia. The prisoners fought back with petitions for writs of habeas corpus but to no avail. The court, two to one, decided that the affidavits sent by General Wilkinson, together with the President's message to Congress, constituted sufficient ground to commit them. Rodney's principal part in the proceedings had been his unsuccessful attempt to prevent Bollman and Swartwout from appearing by counsel to argue that they were detained for no cause. Would not public sentiment, he contended, be stirred against the

<sup>21</sup> See the opposed views of Beveridge, *op. cit.*, III, Chs. 6-9, and Bowers, *op. cit.*, Chs. 18 and 19.

<sup>22</sup> *U. S. v. Burr*, Fed. Cas. 14,692; McCaleb, *Aaron Burr Conspiracy* (1903), 192-193; Richardson, *op. cit.*, I, 404, 412, 415.

prisoners if they were committed after counsel had attacked the evidence upon which the government moved? <sup>22</sup>

The prisoners' counsel, former Attorney General Charles Lee and Francis Scott Key, immediately turned to the Supreme Court asking writs of habeas corpus for their clients. There might have been a jurisdictional battle had Rodney deemed it wise to force one, for the Court's power to issue the writ came from the same section of the Judiciary Act which contained the unconstitutional grant of the mandamus power. The Attorney General declined to argue the point, leaving it to Justice Johnson in a dissenting opinion to point out the discrepancy between calling mandamus original and habeas corpus appellate. The Court granted the writs and then heard the case on its merits.

Treason, the Chief Justice wrote in the language of the Constitution, consisted of levying war against the United States or adhering to its enemies. To be guilty of treason it was not essential that a man appear in arms against his country. "If a body of men be actually assembled, for the purpose of effecting by force a treasonable purpose," said Chief Justice Marshall, "all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." But a mere conspiracy to levy war was not an actual levying thereof and hence not treason. Furthermore, the courts of the District of Columbia had no jurisdiction over acts committed elsewhere. The Court directed the release of Bollman and Swartwout. <sup>24</sup>

Meanwhile Burr, drifting down the Mississippi with a small party of followers whom he had met near the juncture of the Ohio and Cumberland rivers, learned that Bollman and Swartwout had been seized and that his own arrest was planned by General Wilkinson. Burr thereupon surrendered to the civil authority of the Mississippi Territory and was soon subjected to investigation by a grand jury there, only to be declared beyond reproach. Nevertheless, the territorial

<sup>22</sup> *U. S. v. Bollman, et al.*, Fed. Cas. 14,622.

<sup>24</sup> *Ex parte Bollman and Swartwout*, 4 Cranch 75, 126, 136 (1807).

judge, Thomas Rodney, Attorney General Rodney's father, required him to furnish bail. On learning that Wilkinson's men were approaching, Burr went into hiding and then fled in disguise. Finally captured on the Tombigbee River near the present boundary of Alabama, he was brought east to Richmond to face his accusers.\*\*

The Attorney General hastened to Richmond. With District Attorney George Hay he participated in a preliminary hearing to commit Burr for misdemeanor in planning an attack on Spanish territory and for treason in assembling men to seize New Orleans. Chief Justice Marshall, presiding over the circuit court, was convinced that the evidence would sustain detention on the first ground but doubted the second. Burr was committed for misdemeanor, admitted to bail,\*\* and tried for treason.

The events which followed have been often and well told. That Jefferson and Marshall continued their long-standing feud cannot be doubted. That the President was inordinately anxious that Burr be convicted and that the Chief Justice in every important ruling actually impeded and ultimately prevented that outcome is hardly to be questioned. To say that Marshall sought to prevent the punishment of the guilty is to go further than the evidence necessarily warrants, but it is at least certain that the Chief Justice was hard put to reconcile his rulings in Burr's case with the forthright definition of treason which he had given in Bollman's case. Some thought there was scandal, too, when Marshall, Burr, and Burr's counsel dined together before the trial.

Credit for the outcome must also be attributed to the skilled tactics of the defendant, always poised and resourceful. And there was his brilliant staff of counsel—Edmund Randolph, with his "over-awing dignity," his unexcelled powers of invective, and his now long-standing hatred of Jefferson; John Wickham, learned, talented, of commanding presence; and Luther Martin of Maryland, somewhat in his cups as usual but none the less effective when he talked about his "honorable friend" whom men would crucify. These men would have made a *cause célèbre* of any trial.

\*\* Beveridge, *op. cit.*, III, 360-370.

\*\* Mar. 30-April 1, 1800, Robertson, *Burr Trials* (1808), I, 1-20.

Attorney General Rodney did not participate in these proceedings, though he had labored much over the case. District Attorney Hay, "eager, nervous, and not supremely equipped either in mind or attainments," led the prosecution; with him were Alexander MacRae and William Wirt. MacRae, Lieutenant-Governor of Virginia, has been described as a "sour-tempered, aggressive, well-informed and alert old Scotchman, pitiless in his use of sarcasm, caring not the least whom he offended if he thought his affronts might help the cause for which he fought," his sharp tongue coming "from ill nature more than wit." <sup>17</sup>

William Wirt, at thirty-five the star in this group, brilliant, eloquent, with a touch of poetry in his nature, was "no black letter lawyer." He hated criminal trials, but shone in them; knew the flavor of liquor as Martin knew it, but abstained. Unterrified by John Marshall, he worked hard for a conviction. Much was to be heard of this Virginian, transplanted from Maryland. Author, biographer, for a time chancellor of eastern Virginia, he was to be district attorney after Hay, then for twelve years Attorney General of the United States, and finally candidate of the Anti-Masonic Party for President of the United States in the year when Henry Clay and the Bank of the United States tried to drive "King" Andrew Jackson from the President's house. It was in 1807, at the trial of Aaron Burr, that his name for the first time reached beyond Virginia. <sup>18</sup>

Two points in the Burr trials alone require attention here. Even before the indictments had actually been returned, Burr announced that he deemed it necessary to request that a subpoena issue to Thomas Jefferson calling upon him to bring into court a letter supposedly incriminating Burr, which Wilkinson had sent to Jefferson and which Jefferson had mentioned in his message to Congress. This motion was strongly opposed and vigorously defended. Invectives flew, many directed at the administration. Wirt begged to know "what gentlemen can intend, expect, or hope, from these perpetual philippics against the government? Do they flatter themselves that

<sup>17</sup> See Beveridge, *op. cit.*, III, 407 *et passim*.

<sup>18</sup> Kennedy, *Memoirs of the Life of William Wirt* (1856), I and II.



this court feel political prejudices which will supply the place of argument and innocence on the part of the prisoner?"<sup>20</sup>

Marshall granted Burr's motion. The Constitution and laws permitted a person, accused of crime, process to compel the attendance of witnesses. The President of the United States, unlike the King of England, was not above the law. True, the President might be so immersed in his public duties that he could not attend trials, but there were lulls in presidential labors. Let the subpoena issue and if the Chief Executive should be too occupied to respond, that fact would "be sworn on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court, than a reason against its being issued."<sup>21</sup>

Jefferson, of course, did not attend. Instead he wrote Hay that the papers, so far as he knew, had all been carried to Richmond by Rodney and should be in Hay's possession. He and his cabinet officers would gladly furnish any information by depositions if the defendant deemed their testimony necessary. "I am persuaded the court is sensible, that paramount duties to the nation at large, control the obligation of compliance with its summons," he explained. "To comply with such calls, would leave the nation without an executive branch." Furthermore, in many situations reasons of state required that the executive keep matters confidential, and the executive must be free to decide which papers should be made public.<sup>22</sup>

The question whether the President could be subject to proceedings for contempt of court for failure to produce the papers was later raised when Burr, having escaped conviction for treason, was on trial for raising an army to attack Spain. Jefferson ordered Hay to direct the marshal to disregard the attachment for contempt should it issue. The President had earlier asked Rodney's opinion

<sup>20</sup> Robertson, *op. cit.*, I, 113-114, 144, 145.

<sup>21</sup> *Id.*, 181.

<sup>22</sup> Jefferson to Hay, June 17, 1807, *id.*, 255. In 1818, after Wirt had become Attorney General, the issue was again raised, this time in connection with a subpoena *ad testificandum* issued to President Monroe directing him to appear in Philadelphia at the court martial trial of Dr. Barton. Wirt advised that, by the authority of Marshall's opinion, the subpoena had lawfully issued and suggested that Monroe instruct the server of the process to return the writ indorsed to say that the President "stated that his official duties would not admit of his absence from the seat of government." It would be wise, Wirt thought, for the President to offer to give depositions as he had in Burr's case. Wirt to Sec. Adams, Jan. 13, 1818, Ms. Op. Bk. A, 21-23.

on the legality of such a writ. The Attorney General replied that the circuit court sitting in Richmond could not reach beyond the Virginia district to compel the attendance of any person as a witness nor require depositions. Nor could an attachment legally issue to compel a person bound by obligations superior to those of a witness. "A dissolution of the Government might be effected by the instrumentality of subpoenas," said he. "How easy is the task of procuring them from every quarter in the greatest abundance." Let it not be said that the courts would prevent an improper use of their process. "Is every co-ordinate branch of the Government to be at the *discretion* of the judiciary?" he concluded in a flight of oratorical prose. "All the officers necessary for the administration of the government may be dragged from their posts at the most critical and perilous time at the discretion of courts whose discretion must from the nature of the case be the pleasure of any litigious party. The establishment of such doctrines must prostrate the Executive power at the feet of the judiciary who like Aaron's serpent will swallow up every other authority." \*\*

Burr's fate depended upon the evidence and Marshall's definition of treason. The indictment charged that the act of levying war had transpired on Blennerhassett's island in the Ohio River within the Virginia district, but Burr had been, as the government admitted, far distant from that place at the time. It was urged that actual levying of war against the United States must be established before Burr could be proven a traitor.\*\* Moreover, a principal must be convicted of treason before an accessory could be similarly condemned. This remarkable theory, which ignored the common law doctrine that all are principals in treason, required the prosecution of some person in the position of Blennerhassett before Burr could be prosecuted.

"Who is Blannerhassett? A native of Ireland, a man of letters, who fled from the storms of his own country to find quiet in ours," cried Wirt. "Possessing himself of a beautiful island in the Ohio, he rears upon it a palace and decorates it with every romantic embellishment of fancy." Burr was the traitor, Blennerhassett but the

\*\* Beveridge, *op. cit.*, III, 518 *et seq.*; Rodney to Jefferson, Sept. 15, 1807, Jefferson Papers, Lib. Cong., CLXXI, 30148-65.

\*\* Robertson, *op. cit.*, I, 527, 530.

tool. "This unfortunate man, thus ruined and undone and made to play a subordinate part in this grand drama of guilt and treason, this man is to be called the principal offender, while *he*, by whom he was thus plunged in misery, is comparatively innocent, a mere accessory! Is this reason? Is it law? Is it humanity? Sir, neither the human heart nor the human understanding will bear a perversion so monstrous and absurd!"<sup>44</sup>

After prolonged argument, Chief Justice Marshall gave an elaborate opinion to the effect sought by Burr's attorneys, but by somewhat different reasoning. He had to circumvent the plain language of his Bollman and Swartwout dictum that in treason all persons "who perform any part however minute, or however remote from the scene of action . . . are to be considered traitors." The kind of proof the Chief Justice now required the government could not produce, and Burr was saved.<sup>45</sup>

Misdemeanor proceedings under the Neutrality Act of 1794<sup>46</sup> followed the same fate, though Chief Justice Marshall agreed to commit Burr for a further trial in Ohio, not for treason, as District Attorney Hay had twice requested, but merely for a misdemeanor under the Neutrality Act. "If those whose province and duty it is to prosecute offenders against the laws of the United States shall be of opinion that a crime of a deeper dye has been committed," concluded the Chief Justice, "it is at their choice to act in conformity with that opinion."<sup>47</sup> Was this a challenge thrown to Jefferson?

After the outcome of the trials was known, Rodney wrote the President from Wilmington, Delaware. "It is in vain to struggle against wind & tide," he lamented. "The current on the bench was

<sup>44</sup> Robertson, *op. cit.*, II, 96-98.

<sup>45</sup> Marshall's opinion appears, Robertson, *op. cit.*, II, 401-445, 446-448.

<sup>46</sup> 1 Stat. 381, June 5, 1794. Burr's was the second important prosecution under the Neutrality Act within a little more than a year. New York, from April to July 1806, witnessed unsuccessful attempts to convict William S. Smith, surveyor of the customs of that port, and Samuel G. Ogden, for aiding the Spanish-American patriot, General Francisco de Miranda, to initiate an expedition against Spanish South America. An effort on the defendants' part to have various officers of the administration, including Secretaries Madison, Dearborn, and Smith, summoned to testify failed when Jefferson directed them to refrain from obeying the subpoena which issued. The defendants were acquitted by a friendly jury. *U. S. v. Smith* and *U. S. v. Ogden*, Fed. Cas. 16341a-16342b; Robertson, *Francisco de Miranda and the Revolutionizing of Spanish America*, Ann. Rep. Am. Hist. Assn. 1907 (1908), I, 195, 364.

<sup>47</sup> Robertson, *Burr Trials*, II, 539; Am. State Papers, Misc., I, 507 *et seq.*; Beveridge, *op. cit.*, III, 524-528; *U. S. v. Burr*, Fed. Cas. 14694a.

irresistible." At the President's request, he was soon busy selecting and digesting the various materials for presentation to Congress. The result was a voluminous report of November 23, 1807, containing the documents, testimony, and various opinions rendered by Marshall in the course of the entire proceedings.<sup>38</sup> "You will be enabled to judge whether the defect was in the testimony, in the law," Jefferson informed Congress, "or in the administration of the law."

Marshall's rulings left treason difficult to prove; furthermore, they pointed clearly to the fact that no adequate provision existed for punishing conspiracies to commit treason. "The framers of our Constitution certainly supposed they had guarded as well their Government against destruction by treason as their citizens against oppression under pretense of it," said Jefferson in his message, "and if these ends are not attained it is of importance to inquire by what means more effectual they may be secured."<sup>39</sup>

John Randolph of the House Judiciary Committee asked Rodney's advice. "The Constitution has wisely defined the crime of treason; but it must be obvious that, before this crime is consummated by an overt act of levying war, the public peace may be disturbed and the public safety endangered, by the previous preparations for such an event," replied the Attorney General. "It would seem, therefore, essential to the preservation of the public peace, that a conspiracy to commit treason against the United States should be punished in such manner as will be most likely to reform the criminal, and to deter others from the commission of the same offence." A bill was introduced but failed to pass.<sup>40</sup>

While the great state trials of Aaron Burr were exciting, probably the most remarkable undertaking of the Jefferson and Madison administrations was the effort, first through an embargo and then through non-intercourse laws, to compel recognition of American neutral commercial rights. The Embargo Act of December 22, 1807,

<sup>38</sup> Rodney to Jefferson, Oct. 1, 1807, Jefferson Papers, Lib. Cong., CLXXI, 30236-7; *Burr's Conspiracy-Trial at Richmond*, Am. St. Papers, Misc., I, 486-645.

<sup>39</sup> Message of Oct. 27, 1807, Richardson, *op. cit.*, I, 429. Further remarks which he had intended to make but omitted appear in Ford, *op. cit.*, IX, 523-524.

<sup>40</sup> Rodney to Randolph, Dec. 2, 1807, Ann. Cong., XVIII, 1717-1719.

its supplements, and the Non-Importation Act interdicted all foreign commerce, a terrific blow to Federalist New England and the American carrying trade generally. Vessels engaged in the coastal trade and in fishing were obliged to furnish heavy bond. Forfeitures of ships and cargoes and ultimately, after recommendation by Rodney, criminal penalties were provided. On March 1, 1809, Congress substituted the Non-Intercourse Act for the embargo laws. This represented a major change in the policy of the administration and a concession to American commercial interests, trade now being prohibited only with France and Great Britain. The strategic point of this act was the provision for resuming intercourse with either country which revoked its edicts against American commerce.<sup>41</sup>

In Vermont, where extensive smuggling into Canada was a simple matter, the situation became so serious that Jefferson proclaimed a state of insurrection. Both regular troops and the militia were summoned. There were murders and acts of violence against revenue officers and militiamen, and Attorney General Rodney recommended proceeding against the assailants for treason. The effort failed when the circuit court refused to regard as treason individual acts of violence motivated by the desire for private gain from smuggling. Sixty men had taken a raft in Lake Champlain from the custody of the militia; shots were exchanged but no one was injured. "It is the intention with which such resistance is made, not the opposition itself, that forms the criterion," explained Justice Livingston, "otherwise every wilful opposition to a statute, would necessarily be a levying of war."<sup>42</sup>

Early doubt whether the embargo acts were constitutional was removed by a decision of Justice Davis who, after delivering a long exposition on the authority of the courts to review acts of Congress, declared the statutes to be proper exertions of the commerce and war powers. The sharpest legal tilt over the embargo laws came in

<sup>41</sup> 2 Stat. 451, Dec. 22, 1807; *id.*, 453, Jan. 9, 1808; *id.*, 473, Mar. 12, 1808; *id.*, 495, April 25, 1808; *id.*, 506, Jan. 9, 1809; Rodney to Jefferson, April 22, 1808, Jefferson Papers, Lib. Cong., CLXXVII, 31340-31342; Warren, *op. cit.*, I, 355. No cases arose under the Non-Importation Act, 2 Stat. 379, April 18, 1806, which was suspended until Dec. 14, 1807, under the Act of Dec. 19, 1806, 2 Stat. 411; it was repealed by the Non-Intercourse Act of Mar. 1, 1809, 2 Stat. 528.

<sup>42</sup> Proclamation of April 19, 1808, Richardson, *op. cit.*, I, 450; Warren, *op. cit.*, I, 352; *U. S. v. Hoxie*, Fed. Cas. 15407 (1808).

South Carolina where Collector Theus held the *Resource*, nominally bound from Charleston to Baltimore. Vessels engaging in the coastal trade notoriously took advantage of their opportunity to violate the prohibition upon foreign trade. Consequently, Congress had empowered collectors to detain such vessels when, in their opinion, there was an intent to violate the statutes. Theus held the *Resource* not because he thought it contemplated an illicit voyage, but because of an executive order of the Secretary of the Treasury commanding him to hold all vessels loaded with goods in demand abroad. The owners of the *Resource* hastened into the circuit court, Justice Johnson of the Supreme Court presiding, and sought a mandamus to compel Theus to release the ship. The court complied. If the collector, in whom the act vested full discretionary power, did not suspect violation, said the Justice, the vessel must be released.\*\*

The district attorney had not argued the case, and Jefferson was distressed that the embargo should be thwarted by a judge of his own choosing. He turned to Rodney for an opinion on the legality of the entire proceeding, gave it to the press, and sent it to the collectors and marshals for their guidance. Rodney declared that the circuit court had no authority under the statute to issue the high prerogative writ of mandamus. "It might perhaps with propriety be added that there does not appear in the Constitution of the United States anything which favors an indefinite extension of the jurisdiction of courts, over the ministerial officer within the executive department," he wrote. "If in a case like the present where the law vests a duty and a discretion in an executive officer, a court can, not only administer redress against the misuse of the authority, but can previously direct the use to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the Constitution perhaps defeated, which makes it the duty of the President to take care, that the laws be faithfully executed." \*\*

"Unprecedented in the history of executive conduct," exclaimed

\*\* *U. S. v. The Brig William*, Fed. Cas. 16700 (1808); *Gilchrist et al. v. The Collector of Charleston*, Fed. Cas. 5420 (1808).

\*\* *Adams, History of the United States* (1890), IV, 264; Rodney's opinion to Jefferson, July 15, 1808, appears in Fed. Cas. 5420.

Justice Johnson in his own statement to the newspapers. "It is true that a judge may, without vanity, entertain a doubt of the competency of some of the editors of newspapers to discuss a difficult legal question," he wrote, "yet no editorial or anonymous animadversions, however they may have been characterized by illiberality or ignorance, should ever have induced me to intrude these observations upon the public." To the Attorney General's charge that the courts were usurping the executive power, Johnson replied with the doctrine of the supremacy of law. "Laws have no legal meaning but what is given them by the courts to whose exposition they are submitted," he explained. "It is against the law, therefore, and not the courts, that the executive should urge the charge of usurpation and restraint." <sup>45</sup>

Johnson's blast drew a rejoinder from the Attorney General. "It is very evident," Rodney wrote Jefferson, "that Judge Johnson has taken serious offense at the publication of the examination of his opinion. He seems to forget that all his proceedings have gone abroad and were published in every State in the Union. It would seem but fair that the bane and the antidote should circulate together. He has enlisted fairly under the banner of the Judiciary and stands forth the champion of all the *high-church* doctrines so fashionable on the Bench." Rodney lamented the attitude of the courts. "The judicial power, if permitted, will swallow all the rest," he concluded. "It is high time for the people to apply some remedy to the disease. You can scarcely elevate a man to a seat in a Court of Justice before he catches the leprosy of the Bench." <sup>46</sup>

Almost fifty cases under the embargo and non-intercourse statutes reached the Supreme Court between 1809 and 1826; of these roughly half resulted in outright government victories. Four Attorneys General, beginning with Rodney, as well as a long list of district attorneys, fought the violators in the courts, contending against such outstanding figures of the bar as Luther Martin, Charles Lee, R. G. Harper, Joseph Hopkinson, P. B. Key, and Daniel Webster. The question whether trials for seizures of vessels and cargoes under

<sup>45</sup> *Ibid.*

<sup>46</sup> Rodney to Jefferson, Oct. 31, 1808, Warren, *op. cit.*, I, 336.

the embargo and non-intercourse laws should follow admiralty procedure, where no juries were required, was of course important, for the unpopularity of the laws would make good juries hard to find. Attorney General Lee had successfully argued against jury trials in *United States v. La Vengeance*, where arms were exported in violation of the Neutrality Act of 1794. Now, as private counsel, Lee claimed that that case had not been fully argued and had been hastily decided. "I recollect, that the argument was no great thing, but the court took time and considered the case well," responded Justice Chase. "The reason of the legislature for putting seizures of this kind on the admiralty side of the court was, the great danger to the revenue, if such cases should be left to the caprice of juries." When the demand for jury trials was renewed under the Non-Intercourse Act of 1809, the Court refused to change its view.<sup>47</sup>

The Court in interpreting these acts was plagued by the complicated situation arising out of the alternate raising and re-imposing of the bans against France and England. The most important of the cases involving this situation was that of the *Brig Aurora*. "Congress could not transfer the legislative power to the President," argued J. R. Ingersoll of Pennsylvania. "To make the revival of a law depend upon the President's proclamation, is to give that proclamation the force of a law." The government, of course, denied this. "The legislature did not transfer any power of legislation to the President," contended John Law for the United States. "They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect." Justice Johnson, speaking for the Court, touched this phase of the matter briefly. "We can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."<sup>48</sup>

Rodney resigned in 1811 and William Pinkney, just returned from his British mission, succeeded him. From the day when Samuel Chase first lured him into legal studies, Pinkney had been a prodigious reader and soon became known as a fluent speaker. "He

<sup>47</sup> *U. S. v. La Vengeance*, 3 Dall. 297 (Aug. 1796); *U. S. v. The Betsey and Charlotte*, 4 Cranch 443 at 446, n. (1808); *The Samuel*, 1 Wheat. 9 (1816).

<sup>48</sup> *The Brig Aurora*, 7 Cranch 382 (1813).



had the reputation, when I was at school, of being the most eloquent young lawyer in Maryland," said William Wirt. "His foreign service, especially at this particular juncture of our foreign affairs, might make him a useful member of the Cabinet." This distinguished Marylander soon proved that he had few peers at the bar. Chief Justice Marshall called him "the greatest man I have ever seen in a court of justice"; and Chief Justice Taney echoed the same sentiment later. Square-shouldered and erect, the new Attorney General used cosmetics and wore a corset. He loved applause, especially the applause of women. Discourtesy to opponents was his most unpleasant characteristic. "The boast of Maryland and the pride of the United States," cried John Randolph of Roanoke on hearing of Pinkney's death. "There has been a Homer; there has been a Shakespeare," he declaimed; "there has been a Newton; there *may* then be another Pinkney, but there is now none." In 1811 Pinkney had before him the eleven greatest years of his career. For three of them, until he resigned because he did not wish to live in Washington, he served as Attorney General.<sup>49</sup>

Non-intercourse had been interrupted only by abortive negotiations with England in the spring of 1809, and remained in effect against both England and France until May 1, 1810. Trade was resumed with them, but if either revoked its edicts by March 3, 1811, a new statute provided that non-intercourse was to be re-imposed upon the other. Napoleon soon lured Madison into renewing the ban against England, effective on February 2, 1811,<sup>50</sup> and before this mistake could be corrected the United States was at war.

The second war with England began in the summer of 1812. Of the flood of prize cases forced into the courts by the amazing success of the small, swift American privateers, ably supplemented by the Navy, only a few involved the legal interests of the government, because Congress early in the war renounced the customary share of prize money to which the government was entitled. The causes in

<sup>49</sup> Wirt to Dabney Carr, Aug. 11, 1811, Kennedy, *op. cit.*, I, 288; Tyler, *Memoir of Roger Brooke Taney* (1876), 71, 141; Randolph, Speech of Feb. 25, 1822, Ann. Cong., XXXVIII, 1148. See Wheaton, *The Life of William Pinkney* (1826); Pinkney, *Life of William Pinkney* (1853); Dict. Am. Biog. (1934), XIV, 626.

<sup>50</sup> Richardson, *op. cit.*, I, 472, 473, 481; Act of May 1, 1810, 2 Stat. 605.

which the United States appeared arose from captures by its own vessels, seizures in port by its own officers, or cases where the legal effect of captures by privateersmen was open to doubt or tainted with fraud.

Privateersmen and their prey arranged collusive captures for the purpose of bringing much needed British goods from places of storage in New Brunswick or Nova Scotia into American ports. Under the patriotic guise of crippling enemy commerce, an illicit trade with the enemy grew. The United States intervened to deprive the culprits of their ill-gotten gains.<sup>81</sup>

Trading with the enemy was by no means confined to the importation of British goods. The British military establishments both in America and on the Spanish peninsula, where Wellington labored to expel the French conqueror, depended largely upon America as their granary. Consequently, Lord Sidmouth in England and Vice Admiral Sawyer in American waters were very free in granting American shippers licenses to carry cargoes to British possessions, notably Halifax, the West Indies, and the peninsula. The licenses served as safeguards against capture or condemnation by the British and were in great demand among American shippers. Here litigation to stem the illicit trade was successful.<sup>82</sup>

While trading with the enemy was a dramatic maritime phenomenon, the overland trade was far more inimical to the republic's safety. Congress had carefully declared it a misdemeanor subject to serious penalty to "transport" any sinews of war by wagon, cart, sleigh, boat, "or otherwise" into Canada. Yet the British army obtained much of its food supply in this way. Two proceedings reached the Supreme Court. In the first the Court held that fatted cattle were clearly provisions or munitions of war within the mean-

<sup>81</sup> *The George, The Boibnea, and the Janstaff*, 1 Wheat. 408 (1816), 2 Wheat. 169 (1817); Rush, *Statement on the Part of the United States*, Case No. 84, Sup. Ct., Jan. 1816, and Collector Henry Warren of Plymouth to Rush, Jan. 16, 1817, A. G. Ms.; Blake to Rush, undated, A. G. Ms.; *The George*, 2 Wheat. 278 (1817); *The Experiment*, 4 Wheat. 84 (1819), 8 Wheat. 261 (1823); Preble to Wirt, Feb. 1, 1820, A. G. Ms.

<sup>82</sup> 2 Stat. 778, July 6, 1812; 3 Stat. 84, Aug. 2, 1813; 3 Stat. 88, Dec. 17, 1813; *The Julia*, 8 Cranch 181 (1814); *The Caledonian*, 4 Wheat. 100 (1819); *The Langdon Cheves*, *id.*, 103 (1819); Channing, *A History of the United States* (1917), IV, 531.

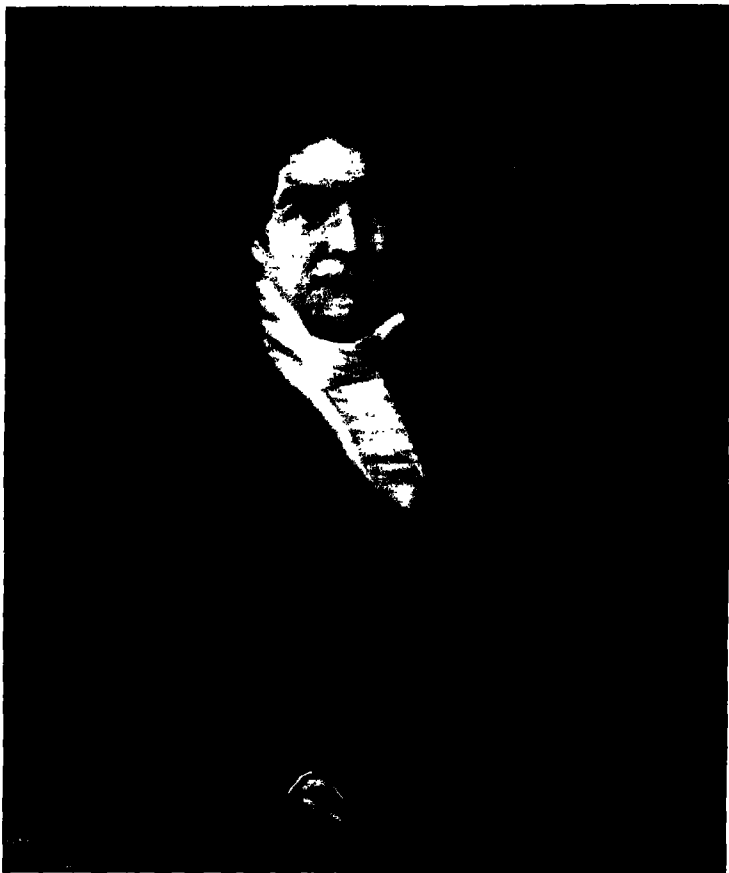
ing of the act. The Attorney General thought this ruling ought to govern the second case as well. The Supreme Court, however, in an hour of literalism thought otherwise. To drive cattle overland on foot was not to "transport" them. So long, then, as Vermont cattle reached the British lines under their own power, their owners or drivers were not punishable. The Court, through George Washington's nephew, Justice Bushrod Washington, admitted that the mischief was the same whether the cattle rode or walked but announced that this fact afforded no reason for construing a penal statute according to equity. By wagon "or otherwise" did not mean by wagon "or a-foot." \*\*

When Pinkney resigned early in 1814, Richard Rush, son of the famous Dr. Benjamin Rush of Philadelphia, became Attorney General, preferring that post to the Secretaryship of the Treasury. An ardent Republican, he warmly opposed the recharter of the Bank of the United States. President Madison had appointed him Comptroller of the Treasury, a position which brought him into contact with the district attorneys through statutory power to direct the institution of suits for debts due the government. As Attorney General, an office which he had previously held in Pennsylvania, he edited the laws of the United States, which appeared in five volumes in 1815. Rush's career, however, was to be less that of a lawyer than that of a politician and a diplomatist. President Monroe made him Secretary of State, pending the return of John Quincy Adams from Europe, and he retired from the cabinet to become Minister to Great Britain.\*\*

His resignation as Attorney General made way for the choice of William Wirt, whose *Life of Patrick Henry* had just appeared. As far back as 1811 when Rodney resigned, Wirt's appointment had been anticipated. He had not at that time particularly desired the post. "What is there in the rough, unbuilt, hot and desolate hills of Washington, or in its winter rains, mud, turbulence and wrangling," he wrote, "that could compensate me for all those pure pleasures of the heart I should lose in such a vicinity?" However, when in

\*\* *U. S. v. Barber*, 9 Cranch 243 (1815); *U. S. v. Sheldon*, 2 Wheat. 119 (1817).

\*\* 1 Stat. 512, Mar. 3, 1797; Dict. Am. Biog., XVI, 231.



WILLIAM WIRT  
From a Portrait in the Department of Justice



October 1817 President Monroe tendered him the appointment with expressions of friendship and respect, Wirt accepted."<sup>88</sup>

Naturally the war had left much litigation in the courts, concerning neutral goods in enemy bottoms and enemy goods or ships wearing the neutral cloak. The guise of neutrality had often to be examined. As in all other classes of prize cases, the government was seldom an interested party."<sup>89</sup> One of the "neutral cloak" cases, *The Amiable Isabella*, brought Attorney General Wirt close to scandal. The vessel, flying Spanish colors, sailed under British convoy from Havana, Cuba, and fell prize to the privateer *Roger*. The vessel was claimed by one Don Alonzo Benigno Munoz, and Wirt became private counsel for the captors. After two decrees in the trial courts, the case was twice argued in the Supreme Court. Munoz maintained that the justices had reached a decision in his favor, that their opinion was taken into Court for delivery, but that at the very hour of the Court's convening the justices received a letter from Attorney General Wirt addressed to the President, one from the President addressed to Wirt, and another from Wirt to the Chief Justice. These letters asked for another argument upon a single point in the case in which the United States was interested because it involved the construction of an important clause in the treaty with Spain. The President and cabinet were impressed by the opportunity to defeat the belligerent rights of the United States which a blind acceptance of the *The Amiable Isabella's* Cuban passport, allegedly given under the treaty, would create. A reargument was held, and the property was finally condemned to Wirt's client. Munoz submitted to Congress a petition for relief."<sup>90</sup>

"The petitioner enters with very little decorum, and, I presume, with as little accuracy of knowledge, into the secret conference of

<sup>88</sup> Wirt to Dabney Carr, Aug. 11, 1811, Kennedy, *op. cit.*, I, 288; Monroe to Wirt, Oct. 29, 1817, *id.*, II, 29; Wirt to Monroe, Nov. 13, 1817, A. G. Ms.

<sup>89</sup> Cases involving the United States: *The Atalanta*, 3 Wheat. 409 (1818), 5 *id.*, 433 (1820) which brought Wirt and his successor, Berrien, together on the same side; *The Venus*, 1 *id.*, 112 (1816); 5 *id.*, 127; *The Amiable Isabella*, 6 *id.*, 1 (1821).

<sup>90</sup> Rep. Jud. Comm. on the Munoz petition, May 4, 1822, Am. State Papers, Claims, 871-873; Wirt to Monroe, Mar. 11, 1820, Letter Bk. A-2, 73 (as given in A. G. Op. (Gilpin ed. 1841), House Doc., VI, No. 123, 26 Cong. 2 Sess., 342, this letter is erroneously dated April 23, 1821); Wirt to Marshall, Mar. 11, 1820, A. G. Op. (Gilpin ed.) *op. cit.*, 246; *The Amiable Isabella*, *supra*.

the judges of the Supreme Court of the United States, and affects to exhibit a statement of their respective opinions in the various stages of their private official advisement," Wirt wrote to the House Judiciary Committee. "To suppose him accurately informed, is to make a supposition not very compatible with the respect which we profess and feel for the judges who compose that court." The Munoz charges insinuated that Wirt had been motivated by the desire to collect his contingent fee. "A wicked and wilful falsehood," replied the Attorney General. "I had no contingency but the petty one of three hundred dollars dependent on the issue; and whether the conduct which I observed on this occasion was prompted by any sordid consideration for this paltry and contemptible sum, or directed by the great public considerations of national importance which I have stated, I am perfectly willing to submit to your award, sir, and that of the honorable gentlemen who compose the Judiciary Committee." \*\*

But if Wirt did not know that a judgment for Munoz had been reached on March 11, 1820—and he said he did not—he knew it a month later. On April 7, 1820, he wrote a letter to his client. "The court rose without deciding the case of the Isabella," he reported. "They had, at first, determined to decide it against us on the Spanish treaty: but I am happy to inform you that on this point they all changed their opinions, except Judge Johnson." The Judiciary Committee thought Wirt's behavior throughout the whole affair was marked "with singular delicacy" and "perfect candor." If Munoz supposed that the President had brought any undue influence to bear upon the final decision of the cause, Chairman Sergeant reported, "it is because he knows nothing of the nature of our judicial tribunals, nor of their perfect independence of all such influence." A situation of this sort could easily arise in a day when the Attorney General did not restrict his activities to official litigation. On the final argument, Wirt was replaced by Pinkney.\*\*

Hardly were the problems following the War of 1812 well on the

\*\* Wirt to Chairman House Jud. Comm., April 24, 1822, 1 Op. 536, 542, 543; Wirt to Monroe, Mar. 11, 1820, Letter Bk. A-2, 73, 74.

\*\* Wirt to Stainback, April 7, 1820, Wirt Letter Bk. V, Lib. Cong.; Am. St. Papers, Claims, 872.

road to settlement when the new nation was faced with international complications arising from the multiple revolutions of Latin America against Spain and Portugal. This led to a revision of the neutrality laws to bring "colonies, districts, and peoples" as well as "foreign states and princes" within their terms and to suppress a thriving arms traffic which centered at New Orleans and at Baltimore. To clear the seas of pirates, often parading under the guise of South American privateers, existing legislation was strengthened. "The District Judge, Houston, and the Circuit Judge, Duval, are both feeble, inefficient men," exclaimed Adams angrily with respect to the situation at Baltimore, "over whom William Pinkney, employed by all the pirates as their counsel, domineers like a slave driver over his negroes." <sup>80</sup> However, the critical period in foreign relations had passed. Internal affairs pressed for attention, and Attorney General Wirt turned his methodical hand to building a law office for the United States.

<sup>80</sup> Dick to Adams, Mar. 1, 1816, Ann. Cong., XXXIV, 1652-1657; *J. Q. Adams' Memoirs*, IV, V, and VI *passim*; Adams, Mar. 29, 1819, Warren, *op. cit.*, II, 37; 3 Stat. 447, April 20, 1818 (neutrality); 3 Stat. 510, Mar. 3, 1819 (piracy).



## CHAPTER V

### "REPUBLICAN ORTHODOXY" AND THE OFFICE OF ATTORNEY GENERAL

"No member of this House needs to be reminded how important are the duties of the Attorney General of the United States, nor risk I contradiction in affirming that they were never more ably or more faithfully discharged than by Mr. Wirt."<sup>1</sup> So spoke John Quincy Adams, who served eight years as William Wirt's cabinet colleague and who, on becoming President, named Wirt Attorney General for four more years.

From 1800 to 1814, three years before Wirt took office, the Attorney General frequently had been an absentee cabinet member, a fact which often proved embarrassing to the President and department heads. The solution of legal questions could not always await the slow progress of the mails.<sup>2</sup> Congress, too, felt the inconvenience of a non-resident Attorney General. On January 5, 1814, the House of Representatives had instructed its Judiciary Committee to look into the expediency of requiring the Attorney General to keep his office at the seat of government during the sessions of Congress. Without awaiting the result of the bill which the committee proposed but which ultimately failed to pass, Attorney General Pinkney, who had no intention of leaving his lucrative Baltimore practice, resigned—much to President Madison's regret.<sup>3</sup> The President was in sympathy with the purpose of the measure and, as Pinkney's successor, selected Richard Rush who was willing to reside at the capital. Thus available, the new Attorney General was called

<sup>1</sup> Remarks in the House of Representatives, Feb. 21, 1834, the day following Wirt's death, *Register of Debates*, X, Pt. 2, 2758.

<sup>2</sup> See letters of Jefferson to Gallatin, Oct. 9, 1801, Adams, *Gallatin's Writings* (1879), I, 57; Gallatin to Jefferson, Jan. 6, 1806, *id.*, 289; Jefferson to Gallatin, June 26, 1806, Ford, *op. cit.*, VIII, 458.

<sup>3</sup> Ann. Cong., XXVI, 852-853, 1114; *id.*, XXVII, 2023-2024; *Madison's Writings* (1865), II, 581.

upon more frequently for opinions and his official business more than doubled.<sup>4</sup> The federal government could no longer rely upon the intermittent services of a practicing lawyer.

The increasingly important office to which William Wirt had succeeded on November 13, 1817, called for high qualities. The Attorney General must be, thought Samuel L. Southard who as Secretary of the Navy served with Wirt in the Adams cabinet, "not only a good lawyer, but a safe statesman." That was not all. "He does not deal with the ordinary routine of business which inferior intelligence and system can manage, but when doubts and difficulties intervene upon the powers conferred by law, or the rights intended to be secured, the appeal is made to him. His labors are always connected with perplexing subjects; and . . . relate to every variety of questions which can arise under our institutions, or from our connexions with the commerce and Governments of the world."<sup>5</sup>

Wirt came expecting to learn much from the precedents set by the distinguished men who had held the office before him during the twenty-eight years since Randolph's appointment. He asked for the books of opinions, for the letter books, and for the document files. But, he wrote President Monroe, there was not to be found "any trace of a pen indicating in the slightest manner any one act of advice or opinion which had been given by any one of my predecessors from the first foundation of the federal government to the moment of my inquiry."<sup>6</sup>

This lack of records and precedents was serious. The questions propounded to him as Attorney General were, as he long afterward told a friend, "all out of the usual walks of my profession, and call upon me to explore new paths, and frequently to chop out an original trace . . . through the wilderness."<sup>7</sup> Consistency and uniformity in the Attorney General's interpretation of law were essential if the government hoped to escape the confusion attending an unsteady and contradictory course. The law was certainly not, Wirt said to the President, "a science of mathematical certainty so that all who

<sup>4</sup> Monroe to Lowndes, Dec. 31, 1816, Ann. Cong., XXX, 699-700.

<sup>5</sup> *Discourse on the Late William Wirt* (1834), 32-33.

<sup>6</sup> Letter to Monroe, Jan. 17, 1818, Letter Bk. A-2, 2.

<sup>7</sup> Wirt to Judge Carr, Feb. 1, 1824, Kennedy, *Memoirs of the Life of William Wirt* (1856), II, 143.

are skilled in it should necessarily come to the same conclusion on every given question." \*

Consistency and uniformity with his predecessors Wirt could not insure, but he immediately determined to keep his own opinions self-consistent and to provide records for his successors. He at once acquired an opinion book and on the fly leaf wrote, "I have determined . . . to keep a regular record of every official opinion which I shall give while I hold this office, for the use of my successor." \*

Two months later, he began a general letter book. Here was copied outgoing correspondence of all sorts, including indeed a great many items which have since appeared in the published opinions of the Attorney General. Wirt's successors continued the two classes of books, which give, in spite of occasional interruptions and omissions, a fairly continuous story of the attorney generalship until the typewriter replaced the pen in the 1880's, seventy years later.<sup>10</sup> Even then the practice of binding typewritten correspondence chronologically into books preserved the form of Wirt's system until 1904.

Not only were there no records but the government provided neither an office nor clerical assistance. As far back as December 1791, Attorney General Randolph, through President Washington, without success had urged Congress to provide a clerk.<sup>11</sup> President Madison, when it became evident that residence at Washington had greatly increased the Attorney General's labor, in 1816 urged that he be supplied with "the usual appurtenances to a public office." A bill to provide offices and a clerk came to the Senate floor on January 10, 1817.

Senators Macon of North Carolina and Mason of New Hampshire argued that to give the Attorney General official quarters and a clerk would transform his office into a department of law—which had never been intended and was a danger to economical government. In effect it would increase the net salary of the Attorney Gen-

\* Letter to Monroe, Jan. 17, 1818, Letter Bk. A-2, 1-2.

\* Op. Bk. A, 1817-1821.

<sup>10</sup> The first two letter books contain wide gaps in almost every administration, but only for the administrations of John J. Crittenden and Caleb Cushing, 1850 to 1857, does the Department of Justice possess no letter books, and there is strong circumstantial evidence that they were not kept at all during that period. Bibb to Cushing, June 6, 1854, A. G. Ms. *Typewriters*: Ann Rep. Atty. Gen. 1883, 40.

<sup>11</sup> Am. St. Papers, Misc., I, 45-46; Ann. Cong., II, 1765-1766.

Attorney General's Office, D. C. Jan. 1897.

Finding on my appointment, the day, as he had, to visit, in person, to inform me of what had been by way of my knowledge of the establishment of the National government, and feeling my own inexperience, both to the matter and myself, from this impression, determined to remedy it, so far as defects in myself, and to supply a record of every official opinion which I shall give while in this office, for the use of my successors.

As, under the arrangement as proposed, I have furnished in the hands of DeLoach only to furnish me with copies of all the documents in which I shall be consulted and which will be found filed and referred to correspond with the numbers in the margin, referred to in this case. I refer under to this Book in the given, with reference, and common heads to each case, for the facility of using the book.

Wm. H. H. H.



eral, which had already risen from \$1,500 to \$3,000, and he was free to engage in the regular practice of his profession—a fortunate circumstance because constant practice was essential to legal success.

The friends of the measure pointed to the great increase in the Attorney General's duties which rendered any considerable private practice impossible. Such practice was, they hinted, incompatible with the faithful performance of his public responsibilities. It would be a convenience to the department heads who needed official legal advice to have the Attorney General housed near them. The clerk should most certainly be provided to preserve records, which former Attorneys General had never done. When the vote came, the measure was tentatively approved by the Senate, except the provision for a clerk, but nothing more was ever heard of it.<sup>13</sup>

After his appointment, Wirt lost little time in urging the matter upon President Monroe and Chairman Nelson of the House Judiciary Committee. The failure of his predecessors to keep proper records Wirt attributed not to any default on their part, but to the fact that they bore the entire expense of their offices. Thirty years had passed since the federal government was first organized. Now, Congress provided offices in the Treasury and a clerk at \$1,000 a year, with an additional small contingent fund of \$500 for such essentials as stationery, fuel, and "a boy to attend the menial duties."<sup>14</sup>

The equipment which Wirt asked consisted of ten book presses, a press for public papers and letter books, a map and chart stand, a writing desk and seat for his clerk, six chairs, two washstands, a stone pitcher and tumblers, and one water table. "As they will be attached to the Attorney General's office as long as they shall last, they ought, I think, to be strongly made, and neat enough not to be discreditable to the nation."<sup>14</sup>

Attorney General Wirt next turned his attention to the practice of his office and soon developed a point of view which he described in one of his opinions as "republican orthodoxy." This he first re-

<sup>13</sup> Richardson, *op. cit.*, I, 578; Ann. Cong., XXX, 48, 60-62.

<sup>14</sup> Wirt to Monroe, Jan. 17, 1818, Wirt to Nelson, Mar. 27, 1818, Wirt to Sen. Edwards, Mar. 28, 1820, Letter Bk. A-2, 1-5, 19-23, 76; 3 Stat. 447 and 500, April 20, 1818, and Mar. 3, 1819.

<sup>14</sup> Wirt to Reg. Treas., June 9, 1818, Letter Bk. A-2, 27.

corded in an elaborate letter on the defects of his office, addressed to President Monroe on January 17, 1818. "In a government of laws like ours," he told the President, "it seems to me of importance that the influence of every office should be confined within the strict limits prescribed for it by law."<sup>15</sup>

This doctrine was of far-reaching consequence. A "government of laws" required many hundreds of legal opinions for officers high and low, executive and legislative. Necessity, on the other hand, required that a line be drawn somewhere. The Judiciary Act of 1789 directed the Attorney General to give advice and opinions on questions of law when required by the President or when requested by the department heads. However, he was frequently called upon for official opinions by many not named in the statute—committees of Congress, district attorneys, collectors of customs, collectors of public taxes, marshals, courts martial, and others. "My opinion is," said Wirt, "that the Attorney General is not bound by the law as it now stands, to obey these calls."

At the same time, Wirt protested against enlarging the terms of the Judiciary Act. It would impose duties, he said, "that *no single unassisted individual* whatever may be his strength, his habits of industry, or the system and celerity of his movements, could discharge." It was, he thought, "the vain and oppressive attempt" on the part of his predecessors to answer from courtesy every call made upon them that had produced such frequent resignations.<sup>16</sup> While to lighten this burden the Senate in 1819 had considered providing Wirt with an assistant,<sup>17</sup> Congress did not increase the list of officers entitled to official opinions, and Wirt proceeded to apply his ideas of limiting his office to the letter of the law. In doing so he laid down the principal rules which were to guide the Attorneys General for the future.

If Wirt did not invent the rule that opinions were to be given only as directed by the terms of the Judiciary Act,<sup>18</sup> he at least made

<sup>15</sup> Wirt to Ingham, Sept. 14, 1821, 1 Op. 492; Wirt to Monroe, Letter Bk. A-2, 1-5.

<sup>16</sup> Wirt to Monroe, Jan. 17, 1818, Letter Bk. A-2, 4, 5.

<sup>17</sup> Ann. Cong., XXXIII, 176, 190.

<sup>18</sup> See Rush to Lee, July 3, 1816, Ann. Cong., 14 Cong. 2 Sess., App. 1223-1224.

it fully operative. His refusals went to state officers,<sup>19</sup> subordinate federal officers, civil and military,<sup>20</sup> and private persons,<sup>21</sup> couched in the most courteous language. Ordinarily, where he felt that the question presented might properly be brought to his attention through an executive department, he would suggest that the application be so submitted.<sup>22</sup>

When Wirt had made it plain that he regarded the language of the Judiciary Act as furnishing an inclusive list of officers entitled to his official opinions, it remained for him next to point out that department heads were entitled to opinions *only*, in the language of the Judiciary Act, in matters "that may *concern* their departments." Here again Wirt was motivated by the same principles which had caused him to deny opinions to unauthorized persons—"republican orthodoxy," as he had put it, and the physical limitations of a one-man office.<sup>23</sup> No longer could a private person secure an official opinion through the courteous agency of a government department.

In 1823 the Agent of the Treasury handed Wirt upwards of fifty pleas and demurrers on which the United States district attorney for Virginia requested him to secure the Attorney General's advice. Wirt, as he later admitted, had thrown himself open to such a request by assenting on former occasions. He decided to change his ways and wrote Secretary of the Treasury Crawford that the Judiciary Act did not require the Attorney General to give his advice and opinion to the district attorneys. "The application having passed through one of the departments does not change its essential character." Five years later Wirt carefully retraced the ground with Secretary of War Barbour, who desired answers to questions propounded by a territorial judge. The War Department, Wirt said, had not shown that the solution of the questions was essential to the discharge of its functions, "and I am not aware of any act of Con-

<sup>19</sup> Wirt to Miller, Surrogate's Office, N. Y., Jan. 17, 1818, Letter Bk. A-2, 6.

<sup>20</sup> Wirt to Meigs, Commr., Gen. Land Office, June 12, 1818, *id.*, 28-29; Wirt to Miller, Hqrs. of Marines, June 12, 1818, 1 Op. 211; Wirt to Smith, Marine Barracks, Oct. 7, 1820, Letter Bk. A-2, 84.

<sup>21</sup> Wirt to Ewell, May 27, 1820, Letter Bk. A-2, 79; Wirt to Melville, Theaman, and Burdick, all of N. Y., June 28, 1820, *id.*, 81.

<sup>22</sup> *E.g.*, Wirt to Miller, June 12, 1818, 1 Op. 211.

<sup>23</sup> *Id.*, 608, April 11, 1823; *id.*, 575, Nov. 5, 1822.



gress which makes it the duty of the Secretary of War to instruct the judges in their duty." <sup>84</sup>

Equal in everyday importance to these rules, restricting the Attorney General's official opinions to authorized officers in the *bona fide* course of their own statutory duties, was a series of more technical rules governing the requests of cabinet officers. Wirt it was who first recorded the propositions that the Attorney General does not decide questions of fact,<sup>85</sup> that the Attorney General does not sit as an arbitrator in disputes between the government departments and private individuals <sup>86</sup> nor as a reviewing officer to hear appeals from the decisions of public officers,<sup>87</sup> that questions of law must be specifically propounded, that questions pending in courts should be left to the courts,<sup>88</sup> and that so far as is possible the judicial principles of *stare decisis* and *res judicata* ought to govern the Attorney General. He was ready to reinterpret the law where a predecessor was in error, but he felt that it would be laborious, indecent, and unsettling to review the previous decisions of the executive.<sup>89</sup>

Yet, while it was relatively simple for the Attorney General to deny opinions to subordinate officers and private persons and to tell department heads that they were entitled to opinions only on matters of law properly connected with the administration of their departments, it was not easy to refuse legal advice to the houses of Congress and their committees. Here, moreover, there was established precedent. Attorney General Randolph had advised the House of Representatives that Andrew Jackson was not entitled to compensation for his services as district attorney in the Southwestern Terri-

<sup>84</sup> *Id.*, 608, 610-611, 613; Wirt to Barbour, Feb. 18, 1828, Letter Bk. A-2, 183-185.

<sup>85</sup> Wirt to Sec. Navy, April 3, 1820, 1 Op. 346; Wirt to Hay, Aug. 8, 1824, Letter Bk. A-2, 151.

<sup>86</sup> Wirt to Barker, Jan. 23, 1818, 1 Op. 209; Wirt to Calhoun, Feb. 3, 1820, Letter Bk. A-2, 67-68; Ann. Cong., XXXVII, 685-686; Wirt to Crawford, Sept. 10, 1821, Letter Bk. A-2, 100. See *Diary of Edward Bates* (Beale ed. 1933), 410, where a private party offered to pay for an opinion.

<sup>87</sup> Wirt to Blagrove, April 6, 1827, Letter Bk. A-2, 178. See also Grundy to Sec. Navy, Sept. 24, 1838, Letter Bk. B, 73-74; Legaré to Spencer, Oct. 20, 1841, Letter Bk. A-2, 503; Legaré to Forward, Mar. 11, 1842, *id.*, 522; *Diary of Gideon Welles* (1911), II, 57-58.

<sup>88</sup> Letter Bk. A-2, 18, 151; A. G. Op. (Gilpin ed.), *op. cit.*, 151-152.

<sup>89</sup> Wirt to Crawford, Dec. 20, 1817, Ms. Op. Bk. A, 15; Wirt to Sec. Navy, Oct. 1, 1825, 2 Op. 8; compare Norton-Kyshe, *op. cit.*, 67-70, 108.

tory," and his successors, Bradford, " Lee," Lincoln," Rodney," Pinkney," and Rush," also had given opinions to the houses of Congress."

William Wirt did not at once bring this practice to an end. Indeed, two opinions addressed to Chairman Lewis Williams of the House Claims Committee appear in *Opinion Book A* in the clerk's hand." On the flyleaf Wirt noted that this was "irregular" and directed that such matters thereafter be recorded in the *Letter Book*. For a time he courteously continued to respond to Congress' requests." Then he saw that the House Committee on Claims proposed to make him its refuge from legal tangles, and it was at this point that he sent his letter to Chairman Nelson of the Judiciary Committee, in language identical to that used earlier to President Monroe, setting forth the doctrine that the Attorney General gave opinions to the committees of Congress as a matter of courtesy rather than of right, and repeating his view that, if he were to continue furnishing opinions to persons or bodies not mentioned in the Judiciary Act, the law should be revised."

With this letter before the House, the next request came not from a committee but from the House itself, which ordered all papers with respect to the accounts of James Thomas, a quartermaster general in the army, "referred" to the Attorney General. The obscure language enabled Wirt to reply that he did not know what service was required of him. "It was natural to suppose," he wrote Speaker Clay, "that it pointed to the performance of some

<sup>80</sup> Mar. 13 and 17, 1792, Ms. Record Bk., Reps. Atty. Gen., I, 140-142.

<sup>81</sup> Opinion on the Galliopolis Lands, Am. St. Papers, Public Lands, I, 23, 24, Mar. 24, 1794.

<sup>82</sup> Am. St. Papers, Misc., I, 138; *id.*, Claims, 184; *id.*, Public Lands, I, 59-60; Ms. Record Bk., Reps. Atty. Gen., 188-192; Ann. Cong., 5 Cong. 3 Sess., App. 3643-3645.

<sup>83</sup> Am. St. Papers, Public Lands, I, 115-119; *id.*, Claims, 289-290.

<sup>84</sup> *Id.*, Public Lands, II, 1.

<sup>85</sup> *Id.*, Claims, 418-419; Ann. Cong., XXVII, 1873.

<sup>86</sup> Am. St. Papers, Claims, 549.

<sup>87</sup> See Ann. Cong., XXVI, 1115; *id.*, XXVII, 2023.

<sup>88</sup> Opinion on Maj. Austin's case and the claim of Bowie and Kurtz, Jan. 6 and 14, 1818, Op. Bk. A, 18-21, 25-27.

<sup>89</sup> Opinion, Feb. 4, 1818, Letter Bk. A-2, 10-11; Mar. 8 and 9, 1818, A. G. Op. (Gilpin ed.), 152-153, 153-156.

<sup>90</sup> *Supra*, n. 13.

known duty attached to the office of Attorney General which would be readily discovered by adverting to the laws. . . . But among those duties there is no one that bears any relation to this order of the House of Representatives." Yet he proceeded to give his opinion.<sup>41</sup>

Finally, by insisting on a strict construction of his opinion function, Wirt decided to put an end to serving as a virtual court of claims. On January 28, 1820, the Committee on Claims reported adversely upon a petition by Major Joseph Wheaton, but the House at Chairman Nelson's suggestion referred the whole matter to the Attorney General. Wirt's response quoted the duties he was sworn to discharge according to law. To be instrumental in enlarging the sphere of his official functions beyond that prescribed by law would be a violation of his oath. He reiterated his oft-expressed view that "in a government purely of laws it would be incalculably dangerous to permit an officer to act under the color of his office beyond the pale of the law," no matter what good intentions there might be.<sup>42</sup> The Speaker laid Wirt's refusal of the desired opinion before the House. If Wirt expected some positive reaction, none came. He wrote no more opinions for the houses or committees of Congress.<sup>43</sup>

But Congress, though it did not designate the Attorney General its official legal adviser, struck out in new directions. Even though he might refuse opinions to the House and its committees, he might be approached through the department heads. He had sometimes hinted that subordinate officers could seek his opinion in this way; why should not the House have the same roundabout privilege?

The House tried it on two occasions early in Attorney General Butler's administration. To both requests Butler returned polite refusals. Following the line laid down by Wirt when subordinate officers had sought official advice in this way, Butler pointed out that the Judiciary Act entitled department heads to opinions only on

<sup>41</sup> 1 Op. 253-255; Ann. Cong., XXXII, 1714.

<sup>42</sup> Ann. Cong., XXXV, Pt. 1, 991; 1 Op. 335-337.

<sup>43</sup> The letter of April 24, 1822, addressed to the Chairman, House Jud. Comm., in 1 Op. 536-543, is rather a defense of Wirt's conduct in the *Munoz* case than an opinion. It was recorded in the letter book. Letter Bk. A-2, 109. And see Dayton to Taney, Jan. 21, 1832, A. G. Ms.; Taney to Dayton, Feb. 1, 1832, 2 Op. 499.

matters coming legitimately within the official duties of the department.”

The houses of Congress, thwarted in their efforts to get legal advice from the Attorney General *via* department heads, now sought to approach him through the President himself.” The Judiciary Act seemed to place no limitation on the power of the Chief Executive to request opinions from the Attorney General. In 1836, when the difficult claim of Don Juan Madrazo came before the Committee on Claims of the House of Representatives, the House referred all the papers to President Jackson, with the request that he obtain Attorney General Butler’s opinion. Butler found himself in a difficult position. He had either to put a narrow construction upon the power of the President or give the opinion as requested. He chose the first course. The authority of the President to require the advice and opinion of the Attorney General, he declared, is necessarily restricted to cases in which such advice and opinion are wanted by the President in the execution of his own functions and duties. “The indirect and circuitous mode which has been taken can make no difference in the real character of the reference,” he wrote. “What the House asks through another must be regarded, in sense and in law, as demanded by itself; and in both cases the legal answer must therefore be the same.”

There remained to the houses of Congress but one sure way to an official opinion of the Attorney General, as Butler pointed out in his letter on the Madrazo claim—by law or joint resolution approved by the President. Curiously enough, the repeated failures of Congress and its committees to obtain official opinions from the Attorney General did not bring a modification of the Judiciary Act nor even stifle the congressional hope that the rule would be broken. Caleb Cushing alluded to the “uncertainty” whether the Attorney General was required to give “near legal” opinions to the Senate or the House, but this doubt had not afflicted Cushing’s predecessor

“ Letter Bk. B, 3-5, Mar. 4, 1834; *id.*, 13-14, Oct. 17, 1834.

“ Attorney General Lincoln had been successfully approached in this way in 1802-1803. *Am. St. Papers, Public Lands*, I, 115-119.

“ Butler to Forsyth, June 28, 1836, *Letter Bk.* 49, 50-51.

Crittenden nor did it trouble his successors. The Attorney General of the United States, unlike the great law officers of England, had not been summoned to give his advice to the national legislature.<sup>47</sup>

Requests from private parties continued to come in, even after the rule that the Attorney General was restricted to advising the President and the department heads had become well established. Many looked upon him as their own personal legal adviser. A few requests for advice taken from the files of Attorney General Johnson's time furnish typical illustrations. A gentleman of the cloth wrote on behalf of himself and his "Revd. brethren—holders of U. S. Treasury Notes" to know whether these notes could be constitutionally taxed by North Carolina. A troubled purchaser wished to know when the lien of the United States attached to real estate which he had acquired supposing it unencumbered. "I am ignorant of the matter and desire information I can rely on," he wrote. "I know of no source to apply for correct information except the Atty. Genl. U. S." A coffee importer in Baltimore asked whether, in the light of the recent demise of the English navigation laws, he might now safely import in a British vessel—and incidentally inquired "what chance there is of my obtaining the consulate of Trinidad de Cuba." A city councillor said, "As you are the chief law officer of the United States I trust it will not be out of place to consult you." A firm of ship owners inquired whether the law relating to seamen would apply to a member of the crew of the *Christopher Mitchell* who one morning was taken sick "by which it was discovered that *he* was a female."<sup>48</sup>

An equally extraordinary request found its way to the desk of Attorney General Hoar when a territorial judge sought an opinion because he had no books with which to formulate his own. A few years earlier the revenue commissioners in Syracuse asked Attorney General Bates to decide whether they or the law firms of that city correctly interpreted the revenue act of 1864. Such letters as these brought polite but positive refusals. The Attorney General regrets

<sup>47</sup> Butler, Letter Bk. B, 51; Cushing to Pierce, Mar. 8, 1854, 6 Op. 326; Crittenden to Davis, House Comm. on Commerce, June 15, 1852, A. G. Ms.

<sup>48</sup> Buxton to Johnson, April 27, 1849; Sanders to Johnson, July 5, 1849; Johnson to Johnson, July 10, 1849; Foran to Johnson, Mar. 13, 1849; C. Mitchell & Co. to Johnson, Aug. 18, 1849; A. G. Mss.

the judge has no books; the law restricts the Attorney General to giving advice to the President and the heads of the departments; were he to vary this rule the burdens of the office already most onerous would become physically impossible.\*\*

The preparation of official opinions was unquestionably the most laborious of the Attorney General's duties. It was likewise a great responsibility. When Calhoun advised Wirt "to study less and trust more to genius," the Attorney General remarked, "He has certainly practised on his own precepts, and has become, justly, a distinguished man. It may do very well in politics, where a proposition has only to be compared with general principles with which the politician is familiar. But a lawyer must understand the particular facts and questions which arise in his cause, before genius has any materials to work upon; and in that preparatory examination consists the labour of the profession."\*\*

Oftentimes this labor came in the midst of a busy court term. Writing to his friend, Judge Carr, Wirt described his difficulties. "During the last Supreme Court I was very much engaged. I was forced to lose my wonted sleep, and had not a moment for exercise. The Court kept me constantly engaged till four o'clock; I had then to hasten home to dinner, and immediately afterwards, to sit down to my papers till ten, eleven, and twelve at night—then up again at three or four in the morning, and with merely time enough to take breakfast, off, as rapidly as my carriage could drive me, to the Capitol, at eleven. This I bore very well for six weeks—when I was required to decide a question of usage, in the department of State, in settling the accounts of foreign ministers, without any previous knowledge on the subject, and with no other guide than huge accounts, of which not one item in a hundred applied to the case. I always disliked accounts. It is a dray-horse business, in which even the triumph of acuteness in discovery has never compensated me for the nauseous labour of the research; it was a case, too, which required a speedy answer—and this, after the exhaustion of past toils

\*\* Hoar to Turner, Sept. 27, 1869, Letter Bk. H, 61; Bates to Hough and others, Sept. 5, 1864, Letter Bk. C, 669-670; Mason to Harrison, July 21, 1845, Letter Bk. B, 195.

\*\* Wirt to Carr, Feb. 1, 1824, Kennedy, *op. cit.*, II, 143.

in court, and during the labour of others still pressing me. As I hate to say 'I can't,' even worse than I hate accounts, I determined to see it out; and despatching my wife and daughter to De Neuville's, and the children to bed, I set into my task."<sup>81</sup>

In addition, more than any other Attorney General of the United States before or since his time, Wirt represented the government in the lower courts. These cases he felt were not a part of his official duties. Consequently Wirt received special compensation—\$1,500 for trying pirates at Baltimore, \$1,000 for prosecuting mail robbers. When the House of Representatives investigated the propriety of Wirt's fees, the Judiciary Committee reported that, where such aid could be given without interference with the Attorney General's official duties, there was no objection to his employment upon the ordinary professional footing."<sup>82</sup> So the matter rested, and Wirt continued to draw fees for representing the United States in the lower courts."<sup>83</sup>

Many of the opinions which Wirt and his successors were called upon to prepare involved claims against the government. In such cases was it the Attorney General's business to substantiate the position of the government against the claimant? "I do not consider myself as the advocate of the government," said Wirt, "but as a judge, called to decide a question of law with the impartiality and integrity which characterizes the judician. I should consider myself as dishonoring the high-minded government, whose officer I am, in permitting my judgment to be warped in deciding any question officially by the one sided artifice of the professional advocate."<sup>84</sup>

The nature of the opinion function made it desirable that a party interested adversely to the government should be allowed to present his side of the case to the Attorney General. Wirt took the view that communications from a private party, like the govern-

<sup>81</sup> May 14, 1821, Kennedy, *op. cit.*, 107.

<sup>82</sup> Report of Reg. Treas. on special sums paid William Wirt, Mar. 20, 1822, Am. St. Papers, Misc., II, 932; Message of April 6, 1822, *id.*, 931; Report of Sergeant of the Jud. Comm., April 12, 1822, *id.*, 931.

<sup>83</sup> Letter Bk. A-2, 192; Report of Reg. Treas., Am. St. Papers, Misc., II, 932.

<sup>84</sup> Wirt to Calhoun, Feb. 3, 1820, Letter Bk. A-2, 67-69; and see Cong. Globe, 36 Cong. 2 Sess., 572, 574, 1203, 1204.

ment's own papers, must come by way of the department which had requested the opinion." A decade later, however, representations were being received directly from claimants." "It is," said Attorney General Legaré, "my uniform course when I have to consider a private claim, to receive any agreement or explanation which the party may have to make, in writing before I have made up my own opinion, and even to wait a convenient time for him to prepare one; but never to communicate with him afterwards. The function which I exercise in such cases is quasi-judicial, and you will see at once the necessity of my adhering to the stern rules which govern judicial inquiry." " Attorney General Mason allowed oral argument in Major Ripley's case in 1845," and when the famous Houmas land claim was before Attorney General Clifford five arguments, some of them printed, were filed by four counsel."

Yet, Wirt said, "the office of Attorney General has no affinity to a court of record, from which copies may be demanded, as a matter of right. . . . The Attorney General is consulted by the Executive, sometimes on diplomatic subjects, and others of a highly confidential nature. According to my view of his official character, it is that of the confidential law adviser of the Executive branch of the government. Hence I have never considered myself as at liberty to give a copy of any official opinion of mine, except on the call of the Executive. No opinion has ever been extracted from my official books except on their call; none has ever found its way to the public except through that channel." "

The first compilation of the opinions was made in 1840 in response to a resolution of the House of Representatives. Attorney General Gilpin pushed the project vigorously and on March 1, 1841, sent the President all the opinions of the Attorneys General he could obtain. This collection, which at once appeared as a printed document of the House of Representatives, was something new. For

<sup>88</sup> Wirt to Ward, Feb. 17, 1828, Letter Bk. A-2, 183.

<sup>89</sup> Gilpin to Lerin, Aug. 24, 1840, Letter Bk. B, 108.

<sup>90</sup> Legaré to Sibbald, Dec. 1, 1842, Letter Bk. A-2, 549.

<sup>91</sup> Lee to Mason, July 2, 1845, A. G. Ms.

<sup>92</sup> Clifford to Young, Mar. 18, 1848, Letter Bk. A-2, 616.

<sup>93</sup> Wirt to Polk, July 21, 1828, Letter Bk. A-2, 197-198; see also Norton-Kyshe, *op. cit.*, 35-36.



the first time the bulk of the opinions of the chief law officer of a great commonwealth became accessible to the public.<sup>61</sup>

In 1850, the House called for the opinions since 1841, and to collect them the President employed his friend, Benjamin F. Hall, an author and lawyer of standing in the State of New York. Hall did an able piece of work, covering the entire period from 1790, and with some difficulty got his allowance of \$3,220. The opinions appeared in two volumes.<sup>62</sup> In 1852, Hall's edition was published on a commercial basis by Robert Farnham. Thereafter private publication became the rule until, with the seventeenth volume, regular government publication began in 1890.

William Wirt had come into office without known precedents to build upon and had chopped his way through a wilderness. "My opinion books," he remarked, "are full of this labour and will save much trouble to my successor. If they were published they would do me more honour than anything else I have ever done."<sup>63</sup> The precedents he had created, and those of his successors, now became available as guides to executives, legislators, and lawyers generally. Light had been admitted into a theretofore shadowy field of public law.

<sup>61</sup> House Jr., 26 Cong. 1 Sess., 665; House Docs., VI, No. 123, 26 Cong. 2 Sess., flyleaf. See Norton-Kyshe, *op. cit.*, 108-110.

<sup>62</sup> Resolution of July 24, 1850, House Jr., 31 Cong. 1 Sess., 1176; Cong. Globe, XXIV, Pt. 2, 1475-1476; House Ex. Docs., VII, Pts. 1 and 2, No. 55, 31 Cong. 2 Sess.

<sup>63</sup> Wirt to Carr, Feb. 1, 1824, Kennedy, *op. cit.*, II, 143.

## CHAPTER VI

### TANEY AND THE MONSTER

WHILE Wirt was organizing a law office for the United States, great movements were afoot. National institutions were forming, and among them none was more fiercely fought than the privately managed Bank of the United States. The first bank charter, which Washington had approved over the objections of Randolph and Jefferson, expired in 1811. The second war with England and the failure to develop an adequate tax policy brought the Treasury to desperate straits. There was no national currency. Except in New England, the state banks suspended specie payments and the notes of banks in one state were not accepted at par in other states. Proposals for a second national bank passed Congress under the conflicting leadership of Calhoun, Webster, Secretary Dallas, and others only to receive Madison's veto.

Major differences on the form of a bank bill were finally eliminated, and Madison suggested the subject to Congress. Speaker Clay appointed Calhoun chairman of a select committee to consider "so much of the President's message as relates to an Uniform National Currency." Dallas proposed a plan substantially the same as the old bank, and Calhoun's committee brought in a bill. Resumption of specie payments was absolutely necessary, Calhoun explained, but the state banks found too great a profit in the unsettled condition of the currency to support such a policy. "Banks must change their nature," he concluded, "before they will aid in doing what it is not in their interest to do." This, the seventh attempt, succeeded when Madison signed the measure on April 10, 1816.<sup>1</sup>

The economic interests of the young nation were expanding. The following year Wirt wrote a young friend that the coming decade would see fundamental changes in American life. "By that

<sup>1</sup> See Catterall, *The Second Bank of the United States* (1903), Ch. I.

time you will have discovered that we are not an agricultural people merely, for we shall have a fleet of thirty sail, and our commerce will cover every sea," he predicted. "The spirit of manufactures, too, will have spread from the north to the south, and our country will be a pretty large epitome of all the pursuits of human life."<sup>2</sup>

At the February term, 1819, the bank statute came before the Supreme Court. Washington and Hamilton had believed in the legality of the first bank. Madison and Clay abandoned their constitutional scruples, hoping to bring order out of financial chaos through the establishment of a second bank. The case now before Chief Justice Marshall and his associates was a prosecution brought by a common informer against McCulloch, cashier of the Baltimore branch of the bank, for issuing bank notes without paying the tax which Maryland required of any bank not chartered by the state. Attorney General Wirt was directed to appear, on behalf of the United States, with counsel for McCulloch.<sup>3</sup>

Had Congress authority to incorporate a bank, had the bank authority to establish a branch in Baltimore without Maryland's consent, had Maryland the right to tax the branch? In arguing these issues Webster, Wirt, and Pinkney for McCulloch, and Joseph Hopkinson, Luther Martin, and Walter Jones for Maryland outdid themselves. "Both in maintaining the affirmative and the negative," said Chief Justice Marshall, "a splendor of eloquence, and a strength of argument, seldom, if ever, surpassed, have been displayed." Pinkney alone spoke for three days. "I never in my whole life heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming," wrote Justice Story. "All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he brushed away with a mighty besom."<sup>4</sup>

Counsel for the bank all maintained that the general constitutional question was closed. Legislative, executive, and judicial acts for three decades had treated the first and second banks as lawfully

<sup>2</sup> Kennedy, *op. cit.*, II, 17.

<sup>3</sup> *Madison's Letters & Writings* (1865), I, 528; III, 55, 56, 542; IV, 485 *passim*; Veto Message of Jan. 30, 1815, Richardson, *op. cit.*, I, 555; Schurz, *Henry Clay* (1899), I, 64-66, 133; *McCulloch v. Maryland*, 4 Wheat. 316, 321, n.(a) (1819).

<sup>4</sup> *Id.*, 426; Beveridge, *op. cit.*, IV, Ch. VI.

established; the power to create a bank, Wirt stated, "must be considered as ratified by the voice of the people, and sanctioned by precedent." <sup>5</sup> Counsel for Maryland did not entertain this comfortable doctrine. The Constitution said nothing about chartering a bank, or any other corporation, though it did say that Congress might make laws "necessary and proper" for carrying into execution the specifically mentioned powers of Congress.

Luther Martin, a member of the Constitutional Convention who had opposed the Constitution and was now an aging champion of states' rights, declared that the framers of the Constitution had intended to leave nothing like this to implication. Jones was equally plain, and fastened upon "indispensably requisite" as the synonym of "necessary." Hopkinson struck a new note. What was necessary at one time might not be necessary at another. "The argument might have been perfectly good, to show the necessity of a bank, for the operations of the revenue, in 1791, and entirely fail now, when so many facilities for money transactions abound, which were wanting then." <sup>6</sup>

"An interpretation," replied Wirt, "so strict and literal would render every law which could be passed by congress unconstitutional; for of no particular law can it be predicated, that it is absolutely and indispensably necessary to carry into effect any of the specified powers; since a different law might be imagined, which could be enacted, tending to the same object, though not equally well adapted to attain it." As to Hopkinson's argument, Wirt maintained that the powers of Congress were not "shifting" and dependent upon "extrinsic or temporary circumstances." <sup>7</sup>

Whether the Baltimore branch of the bank was lawfully established was the second question. "If this power belongs to congress, it cannot be delegated to the directors of a bank, any more than any other legislative power may be transferred to any other body of citizens," argued Hopkinson. "Will it be tolerated, that twenty directors of a trading corporation, having no object but profit, shall, in the pursuit of it, tread upon the sovereignty of the state; enter

<sup>5</sup> *McCulloch v. Maryland*, *supra*, 353.

<sup>6</sup> *Id.*, 354-357.

<sup>7</sup> *Id.*, 331, 367, 374.

it, without condescending to ask its leave; disregard, perhaps, the whole system of its policy; overthrow its institutions, and sacrifice its interests?" Wirt responded very briefly that Congress might rightfully decide that there should be branches, since they were a necessary part of the bank, and that their establishment was left to the directors only as a matter of detail.<sup>8</sup>

The final question was whether Maryland could tax the bank's notes. Following Webster's exposition of the supremacy of federal law and the destructive character of Maryland's tax, Hopkinson pointed out that the federal government taxed state banks. Why then should not Maryland tax banking corporations created by the United States? "A right to tax, is a right to destroy, is the whole amount of the argument, however varied by ingenuity, or embellished by eloquence," he argued. "If the states have the power contended for, this court cannot take it from them, under the fear that they may abuse it." Wirt made brief reply,<sup>9</sup> but the great burden of the argument for the bank was left to the eloquent Pinkney.

John Marshall wrote the opinion of the Court. "The sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people," said the Chief Justice in the vein of Alexander Hamilton nearly three decades before. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."<sup>10</sup>

The attempt of counsel for Maryland to get the Court to look into the present necessity for the bank was rejected in language destined later to serve Andrew Jackson well. "To undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground," said the Chief Justice. "This court disclaims all pretensions to such a power."<sup>11</sup>

<sup>8</sup> *Id.*, 336-337, 359-360.

<sup>9</sup> *Id.*, 347-348, 361.

<sup>10</sup> *Id.*, 421.

<sup>11</sup> *Id.*, 423.

The establishment of branches was subordinate business which Congress could leave to the directors. Finally, the bank was an instrumentality of the federal government. The power to tax was the power to destroy. Marshall resolved the conflict by a forceful exposition of the supremacy of federal law. The argument that, if the United States could tax state banks, states could tax the United States bank, he refuted by saying that the whole might tax the part, but the part might not tax the whole.

The Supreme Court with the stellar trio, Webster, Wirt, and Pinkney, saved the bank from assassination at the hands of unfriendly state legislatures, but it had no power to curb the bank's suicidal instincts. The policies pursued under William Jones, its first president, were definitely of this character; and at the very time when *McCulloch v. Maryland* was before the Court the bank was struggling, under the new leadership of Langdon Cheves, to avert bankruptcy.<sup>12</sup> In Congress, a report censured the bank for mismanagement, speculation, and charter violation, but a resolution carrying an ultimatum directing the Attorney General to bring a suit against the bank for charter violation unless it agreed to certain demands met defeat when it became evident that the charter had not actually been violated.<sup>13</sup> Wirt was thus spared a compulsory somersault from defense to attack.

The next two years found the Attorney General often occupied with the bank's affairs. He wrote opinions for the Secretary of the Treasury.<sup>14</sup> Twice at least he journeyed to Bel Air to aid Maryland's counsel in prosecuting three officers of the Baltimore branch for a conspiracy to defraud the bank of hundreds of thousands of dollars, and incidentally to enjoy the sweet hams, fat young geese, boiled chickens, desserts, tarts, sweetmeats, and cheeses which loaded the table in that "delicious" town. Ultimately, after the case had been twice heard in Harford County with an appeal by the state on writ of error intervening, James W. Buchanan, George Williams, and

<sup>12</sup> Catterall, *op. cit.*, Chs. II, III, IV.

<sup>13</sup> *Id.*, 58-60.

<sup>14</sup> Cheves to Crawford, April 6, 1819, Am. St. Papers, Finance, IV, 873; Crawford to Wirt, April 8, 1819, A. G. Ms.; Wirt to Crawford, April 15, 1819, 1 Op. 268; Catterall, *op. cit.*, 74-75; Wirt to Jones, Oct. 16, 1820, A. G. Op. (Gilpin ed. 1841), *op. cit.*, 293, 294.

that same McCulloch whose name appears wherever the story of constitutional history is told escaped conviction."<sup>15</sup>

As the election of 1828 approached, it became evident that Andrew Jackson would become President. Not since Jefferson's time had there been a complete change of administration. Were the cabinet officers required to resign? Monroe thought probably so, except for the Attorney General. "Your duties are different," he wrote Wirt in words now strangely unfamiliar. "The President has less connection with, and less responsibility for the performance of them."

When John Quincy Adams left the Presidency all was peace and harmony between the bank and the administration. Secretary of the Treasury Rush pronounced a parting blessing upon the bank; and William Wirt, who penned his resignation at 7:30 P.M., March 3, 1829, had been its staunch friend and counselor.<sup>16</sup>

Jackson assigned cabinet posts to three of the political supporters of Vice President Calhoun. One of these was Georgia's "honey-tongued" Senator John Macpherson Berrien, who became the tenth Attorney General of the United States. Born in New Jersey, educated at Princeton as were three of his predecessors, Berrien enjoyed a professional reputation in the South comparable to Webster's in New England. Unlike Webster, he had had judicial experience. In the Senate since 1824 Berrien had spoken ably on most important questions—the tariff, the Pan-American congress, the national bankruptcy legislation, Georgia's Indian problems, and judiciary reform. His oratorical skill, his "chaste, free, beautiful elocution," made him effective in court and legislative chamber.

Yet as a politician Berrien had shortcomings. "He was cold and reserved, an aristocrat in manner, as in feeling," says the historian of the *Party Battles of the Jackson Period*. "He made a virtue of not cultivating the multitude, scorned all compromise with his con-

<sup>15</sup> Wirt to Mrs. Wirt, Sept. 4, 1820, Kennedy, *op. cit.*, II, 101, 105; Catterall, *op. cit.*, 42-50; *State v. Buchanan et al.*, 5 Harris & Johnson (Md.) 317 (1821); *An Exhibit of the Losses Sustained at the Office of Discount and Deposit, Baltimore, a Report of the Conspiracy Cases* (1823).

<sup>16</sup> Kennedy, *op. cit.*, II, 222; Wirt to Adams, Mar. 3, 1829, Letter Bk. A-2, 212. Various Wirt manuscripts show him to have been employed by the bank from time to time. Rush, Report of Dec. 6, 1828, House Doc., I, No. 9, 20 Cong. 2 Sess., 8-10.

victions, firmly believed in himself, and was not at all impressed with opposition." He was tactless, caustic, dictatorial, and selfish. "But his admirers, who liked to compare him with Cicero, took pride in this weakness."<sup>17</sup>

Jackson thrust the bank question forward in his initial annual message on December 8, 1829. The charter would not expire until 1836, and the friends of the bank and the opposition in Congress were taken by surprise. The President had spoken in language borrowed largely from James A. Hamilton, son of Alexander Hamilton but not heir to his political ideas. "Both the constitutionality and the expediency of the law creating this bank are well questioned by a large portion of our fellow-citizens, and it must be admitted by all that it has failed in the great end of establishing a uniform and sound currency." He suggested a national institution founded on government credit and revenues, which would avoid the constitutional objections and yet meet more adequately the requirements of the nation.<sup>18</sup>

These recommendations had been made against the earnest advice of his Attorney General. Berrien granted that doubt as to the bank's constitutionality still existed, but to a lesser degree than formerly. "At the same time," he pointed out, "it must be admitted, that the existence of the power, has at various times, and in different forms, been affirmed by every department of the Government." It would be better, he thought, to wait until the necessity of action raised the issue. The bank charter still had five years to run. Indeed, the question might not arise at all during Jackson's term. To raise it now would cause a sensation, break down "harmonious concert of opinion," and bring into active opposition the bank as well as those interested in its welfare or controlled by its influence.<sup>19</sup>

Yet, in spite of the ominous language of the message of 1829, no open struggle with the bank ensued. Berrien wrote only one official opinion affecting the bank, interesting only for its discussion

<sup>17</sup> Bowers, *Party Battles of the Jackson Period* (1928), 61. See Dict. Am. Biog., II, 225; Jones, *John Macpherson Berrien* (1891); Van Buren, *Autobiography* (1920), 257-258; Berrien to Jackson, April 9, 1829, Bassett, *Jackson's Correspondence* (1931), IV, 22.

<sup>18</sup> Compare Hamilton's draft, *id.*, 97 n., with Richardson, *op. cit.*, II, 462.

<sup>19</sup> Bassett, *op. cit.*, IV, 94-95.



of the law of resignations. The flow of other business through the Attorney General's office was steady. In the Supreme Court, Berrien's cases touched the typical problems in the litigation of the period—the right of the United States as a creditor, its revenue problems, the public domain, and the slave trade.<sup>20</sup>

The break-up of the first Jackson cabinet, skilfully engineered by Martin Van Buren after the open breach between the President and John Calhoun, is an old story. In the controversy over Peggy O'Neil Eaton, John Berrien and his wife played their parts along with the Branches and the Inghams. When the Calhoun purge had been arranged, Berrien did not resign—earnestly hoping instead to serve the administration by finding an acceptable solution to the drawn-out conflict between the Cherokee Nation and his own Georgia. Many party leaders, too, felt that the Eaton affair had been given too much prominence and that Berrien's retention would clear Jackson of the charge that the affairs of state were being sacrificed to punish gossips and cads.<sup>21</sup>

Jackson, however, was determined to make a change. He had settled upon Maryland's attorney general, Roger Brooke Taney, for the post. Taney held off at first, urging through his brother-in-law, Francis Scott Key, that Berrien be retained if at all possible. Jackson, although he expressed high regard for Berrien, replied that he must go. Every concession was made to Taney, even to suggesting non-residence, in order to secure his acceptance. He capitulated. Berrien was asked to resign, and on June 21 and 24, 1831, formal letters were exchanged which brought Taney into the Jackson cabinet.<sup>22</sup>

The tall, stoop-shouldered Taney at fifty-four led the Maryland bar and stood high among the Jacksonians in that state. Well grounded in the mysteries of his profession, he had made headway not by florid oratory but by clear and simple speaking. On the great question which was most to concern him as a cabinet officer, he had firmly established ideas. As a state senator, he had opposed the

<sup>20</sup> Berrien to Ingham, Feb. 2, 1831, 2 Op. 406.

<sup>21</sup> On the Eaton affair, see Bassett, *Life of Andrew Jackson* (1925), Ch. 22; Bowers, *op. cit.*, Ch. 5.

<sup>22</sup> Parton, *Life of Andrew Jackson* (1860), III, 356-359; Tyler, *Memoir of Roger Brooke Taney* (1872), 168-174.

Maryland law taxing the United States bank, but he had little use for that institution and opposed it in the courts. Furthermore, he was allied with state banking interests in Maryland. Andrew Jackson was to find him a mainstay in the approaching storm."<sup>22</sup>

The winter of 1831-1832 proved to be decisive in the settlement of the bank question. Nicholas Biddle, the bank's new president, still hoped the Jacksonian heart might soften. The brilliant Livingston as Secretary of State, the Westerner Cass as Secretary of War, and the ambitious McLane as Secretary of the Treasury supported recharter. In the cabinet only Taney stood out against the bank. McLane worked carefully and warned Biddle against rash action lest the chance of peaceful settlement be lost. In spite of Taney's opposition, McLane had succeeded in securing a mild paragraph on the bank in the annual message of 1831 and had received tacit presidential permission to make laudatory remarks on the subject in his annual report."<sup>24</sup>

To the impartial adviser, the true course of action for the bank, thus circumstanced, would have been to give sweet reasonableness its day, but the bank's advisers, notably Henry Clay, Daniel Webster, and John Sergeant, though liberally retained and unusually able, dreamed more of displacing Andrew Jackson than of serving Nicholas Biddle. From the convention of the national Republican Party, which named Clay and Sergeant as its ticket, poured forth a condemnation of Old Hickory's bank policy. Jackson assured John Randolph of Roanoke that he stood on the bank where he had always stood and that McLane's pro-bank sentiments did not commit the President. To Van Buren, Jackson confided that if only he and Eaton were again in the cabinet it would be the strongest and happiest that could be formed. "We could controule the little Federal leaven in that high minded honorable and talented friend of ours, mr McLane."<sup>25</sup>

Clay and his fellow leaders drove Biddle to seek an early rechar-

<sup>22</sup> On Taney, see Swisher, *Roger B. Taney* (1935); Tyler, *op. cit.*; Steiner, *Life of Roger Brooke Taney* (1922).

<sup>24</sup> Swisher, *op. cit.*, 176-179.

<sup>25</sup> Bassett, *Life of Andrew Jackson* (1925), 613; Jackson to Randolph, Dec. 22, 1831, Bassett, *Jackson's Correspondence*, IV, 387; Jackson to Van Buren, Dec. 17, 1831, *id.*, 385.

ter. They made impossible a compromise which McLane and Livingston favored and thought Jackson would approve. Finally a recharter bill, modified slightly to mollify the state banks, was driven through both houses of Congress by substantial majorities. It reached the President's desk early in July. Livingston, Cass, and McLane preferred a veto which would leave the door ajar. Taney had already urged an unqualified veto in two unsolicited letters," and the reasons presented by these letters were to be largely incorporated in the veto message of July 10, 1832.

The President called Taney back from Annapolis where he had gone to attend the Maryland court of appeals. For three days the Attorney General labored over the veto message, a rough draft of which had been prepared by "that mysterious recluse," Amos Kendall, fourth auditor of the Treasury, newspaperman, politician extraordinary, and foremost member of that little group of Jacksonians whom history dubs the Kitchen Cabinet. According to Taney's statement, A. J. Donelson, the President's private secretary, Levi Woodbury of the Navy Department, and the President aided him in preparing the veto."

As finally produced, the message opened and closed with a vigorous political attack upon the bill. "In ingenious variations of light and color," says Clay's biographer Schurz, "it exhibited the bank before the eyes of the people as an odious monopoly; a monopoly granted to favored individuals without any fair equivalent; a monopoly that exercised a despotic sway over the business of the country; a monopoly itself controlled by a few persons; a monopoly giving dangerous advantages to foreigners as stockholders; a monopoly the renewal of which would put millions into the pockets of a few men." "

Out of the whole attack came a statement of Jackson's political faith. "Every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—

" Swisher, *op. cit.*, 190-193.

" *Id.*, 194.

" Schurz, *op. cit.*, I, 376.

who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government."

"There are no necessary evils in government," it continued. "Its evils exist only in its abuses." This was a high note in the politics of the time. "If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing." Such words were heresy to the remnants of the aristocratic Federalists.

"It is time to pause in our career to review our principles, and if possible revive that devoted patriotism and spirit of compromise which distinguished the sages of the Revolution and the fathers of our Union," Jackson concluded on this point. "If we cannot at once, in justice to interests vested under improvident legislation, make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many, and in favor of compromise and gradual reform in our code of laws and system of political economy." If these words, as Jackson's biographer Bassett suggests, were written by some purveyor of "balderdash," they at least rang true in the ears of the common man."

The constitutional argument against the recharter, a part of the message unquestionably Taney's, was ingenious. "It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decisions of the Supreme Court," read the veto. "Mere precedent is a dangerous source of authority and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be regarded as well settled." But how were Andrew Jackson and his Attorney General to contradict John Marshall who had spoken from the eminence of the Supreme Court? "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution," continued

<sup>22</sup> Richardson, *op. cit.*, II, 590-591; Bassett, *Life of Andrew Jackson* (1925), 619.

the message. "The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve." <sup>80</sup>

This, said Nicholas Biddle, was Andrew Jackson's "manifesto of anarchy." The language contributed to the belief that Jackson did not consider himself bound to obey the judgment of the Supreme Court, a view already held by many because Jackson had not enforced the decrees against Georgia in the Indian cases. "If these opinions of the President be maintained, there is an end of all law and all judicial authority," declared Webster. "Statutes are but recommendations, judgments no more than opinions." Nor was this all. "Such a universal power as is now claimed for him, a power of judging over the laws, and over the decisions of the tribunal, is nothing else than pure despotism," he continued. "If conceded to him, it makes him, at once, what Louis the Fourteenth proclaimed himself to be, when he said, 'I am the State.'" And Henry Clay, who fondly believed the country would entertain as low an opinion of the veto as he himself did, declared this doctrine meant a universal right of nullification—"that of South Carolina applied throughout the Union." <sup>81</sup>

There was another more adroit argument in the veto, however. It made *McCulloch v. Maryland* its springboard. The Court had not passed on the specific features of the bank charter; instead it had held merely that the law creating the bank was a constitutional exercise of power by Congress. "To inquire into the degree of its necessity," Chief Justice Marshall had said, "would be to pass the line which circumscribes the judicial department and to tread on legislative ground." Very well. The constitutional test whether a power is "necessary and proper" must be made somewhere. "Under the decision of the Supreme Court, therefore, it is the exclusive

<sup>80</sup> Richardson, *op. cit.*, II, 581-582.

<sup>81</sup> Bassett, *op. cit.*, 620; Register of Debates, VIII, Pt. 1, 1232, 1233, 1273. See the explanation later made by Taney, Swisher, *op. cit.*, 197. Compare language and a theory not unlike Jackson's stated by a President of another temperament, Taft, Veto Message of Feb. 28, 1913, Cong. Rec., XLIX, 4291 at 4292; there, however, the Supreme Court contradicted the President after rather than before his veto. See Ch. XXIII *infra*.

province of Congress and the President," said Jackson, "to decide whether the particular features of this act are *necessary* and *proper* in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or *unnecessary* and *improper*, and therefore unconstitutional." <sup>83</sup>

Moreover, the bill would pledge Congress not to create a competing bank for fifteen years; and it would greatly restrict Congress in setting up banks in the District of Columbia. It was unconstitutional for Congress to barter away the powers which belonged to it and its successors. "Every act of Congress, therefore, which attempts by grants of monopolies or sale of exclusive privileges for a limited time, or a time without limit, to restrict or extinguish its own discretion in the choice of means to execute its delegated powers is equivalent to a legislative amendment of the Constitution, and palpably unconstitutional." Other specific provisions of the bill were unnecessary and therefore unconstitutional. <sup>84</sup>

Thus did the Jackson-Taney combination do what the Supreme Court had refused to do, namely, measure the necessity of each provision of the bank bill. Through the door which Chief Justice Marshall left ajar in *McCulloch v. Maryland* Andrew Jackson and his administration marched to triumph over the bank, while Clay and Webster and Biddle raved and the masses cheered. Although in their "ludicrous and almost pathetic blindness" the bank and its friends deemed the veto an insult to the common sense and moral feelings of the voters who could be expected to damn the administration wherever it was read, says the bank's historian Catterall, the real truth of the matter was that it tapped emotional, class, and sectional sentiments which destroyed not the giant-killer but the giant. <sup>84</sup>

No institution with the economic power and political support of the United States bank would surrender without a fight. It employed two weapons, political propaganda and economic pressure, to demonstrate its utility, the malevolence of its enemies, and

<sup>83</sup> Richardson, *op. cit.*, II, 582, 583.

<sup>84</sup> *Id.*, 584.

<sup>84</sup> Catterall, *op. cit.*, 240, 241.

the calamities which would ensue upon its demise. Some of its measures, such as the distribution of 30,000 copies of the veto, were singularly inept. The contraction of its loans, coming too late to affect the mass of the electorate, could be pictured as the execution of a plot designed to frighten the administration into recharter and the people into voting for Clay. Henry Clay made many political mistakes in his repeated efforts to attain the Presidency, but none was greater than his attempt to conquer Andrew Jackson with a \$30,000,000 corporation.

When the people reelected Old Hickory against the combined power of all his enemies, the bank's fate was sealed. The administration meditated two lines of procedure, whether to destroy the bank by legal action to vacate its charter or to weaken it by dismissing it so far as possible from its position as the government's fiscal agent. Undoubtedly the partisan conduct of the bank during the campaign of 1832, the efforts made by Biddle to keep holders of government debt certificates from turning them in when the administration declared them payable, as well as the partisan advantage to be gained by putting the government moneys elsewhere influenced this policy.

The proposed legal action received Secretary McLane's support at a cabinet meeting in January 1833, but Attorney General Taney advised strongly against it. He stated frankly that it would be difficult if not impossible to establish by proof in a court of justice that the bank had violated its charter. "Besides, the case must be tried in Philadelphia, before a Philadelphia jury, with all the leading counsel of that city retained as counsel for the bank, and it would obviously be impossible to obtain a verdict against the bank in a case where the trial from its very nature must last some weeks, and the jury during all that time exposed to the influences which the bank would not scruple to exercise; and that such excitement would be got up through the local press and otherwise in its favor that even honest and incorruptible men on the panel most probably would not have the firmness to withstand it." To this Taney added that Justice Baldwin, who would preside over such a trial, was a partisan of the bank and temperamentally unfit for a case of the sort.

Taney feared that Baldwin would make his charge to the jury a vehicle for attacking the veto and for lecturing Jackson."<sup>88</sup>

Instead, Taney urged the removal of the deposits. With Amos Kendall he was Jackson's principal support in this policy, and his views were repeatedly announced to Jackson. He charged the bank with many forms of gross and palpable violations of its duty to the public. "The attempt of a great monied institution like the Bank of the U. States to exercise an influence over the press of the country by the mere power of money, is pregnant with so much evil that it cannot be too severely and pointedly reprobated," he urged. The need for a suitable fiscal agent might perfectly well be met by judiciously selected state banks. These views conformed to those of the President."<sup>89</sup>

In June 1833, before the policy respecting the deposits was finally settled, a long planned reorganization of the cabinet took place. Livingston went as minister to France; McLane was transferred from the Treasury to the Department of State; and William J. Duane, son of the editor whom Attorney General Charles Lee had once been directed to prosecute, succeeded McLane. The deposit question then moved swiftly to the front. Amos Kendall pressed plans for removal. Duane, it was soon revealed, believed no cause for removal existed; furthermore, he thought the state banks, rather than incur the vengeance of the United States bank, would refuse government deposits. In July Amos Kendall undertook a mission to the eastern cities to discover the attitude of the state banks. Although the trip was not an unqualified success, Kendall finally reported to Jackson that a sufficient number were ready to serve the government."<sup>90</sup>

Meanwhile the President was busy planning the steps necessary to bring about the removal. Before leaving for Rip Raps, his summer retreat at Hampton Roads, Virginia, he talked with Taney,

<sup>88</sup> Taney, *Bank War Ms.*, Lib. Cong., 149-150; Maryland Hist. Mag., IV (Dec. 1909), 297-298.

<sup>89</sup> Taney, *op. cit.*, 152-153; cabinet opinion, March 1833, Bassett, *Jackson's Correspondence*, V, 34-41; Taney to Jackson, Aug. 5, 1833, *id.*, 147-149; Jackson to the cabinet members, Mar. 19, 1833, *id.*, 32-33; Taney to Jackson, April 29, 1833, *id.*, 68-71.

<sup>90</sup> Kendall, *Autobiography* (1872), 379-384; Catterall, *op. cit.*, 293; Swisher, *op. cit.*, 225-226.



intimating that if Duane resigned, as he had promised to do if he could not cooperate, the Attorney General would be made Secretary of the Treasury. "I am prepared to hazard much," Taney wrote Jackson a week later, "in order to save the people of this country from the shackles which a combined monied Aristocracy is seeking to fasten upon them." Yet there were obvious pitfalls ahead. "After a life of so many hazards in the public service, and after achieving so much for the cause of freedom in the field and in the cabinet," Taney concluded with subtle challenge, "I have doubted whether your friends or the country have a right to ask you to bear the brunt of such a conflict as the removal of the Deposites under present circumstances is likely to produce." \*\*

Jackson's reply indicated his determination. "The United States Bank attempts to overawe us; it threatens us with the Senate and with Congress, if we remove the deposits," he wrote. "As to the Senate, threats of their power cannot control my course, or defeat my operations." If Duane would not depose the bank as custodian of public funds, then Taney could carry on in the Treasury and the battle could be fought and settled before his nomination was sent to the hostile Senate. "Every investigation gives us evidence of the assumed power of this monster," he concluded. "It must be thought by Mr. Biddle that it is above the law, and beyond any control of the Executive Government. He has boasted that it is. We must test this matter and meet it promptly and boldly, and no doubt remains on my mind that we will be sustained by the people." \*\*

Before leaving Rip Raps, Jackson drafted a paper setting forth the reasons upon which he expected to justify the termination of the government's relationship with the bank. This he sent to Taney for revision. When the President returned to Washington, the deposit question came before the cabinet, McLane and Duane now alone opposing the removal. Jackson made an attempt to transfer Duane to a diplomatic post, but the Secretary would not resign and would not remove the deposits because he thought such an action unlawful. Jackson referred Duane to Taney. "I have told him to take

\*\* Taney to Jackson, Aug. 5, 1833, Bassett, *op. cit.*, V, 148.

\*\* Jackson to Taney, Aug. 11, 1833, Maryland Hist. Mag., IV (1909), 300.

the atto Genls. opinion and pursue it," the President wrote Van Buren, "he being our legal adviser, his opinion of the law, where there were doubts, ought to govern the heads of the Departments as it did the President." Jackson then determined to temporize no longer. Taney was urged to hasten his revision of Jackson's paper sent from Rip Raps, so that the department heads might know the President's will. "If Mr. Duane will not agree to carry into effect these conclusions and remain, the sooner he withdraws the better." <sup>40</sup>

Taney set to work immediately and finished his revision on September 16, 1833. The document became famous as "The Paper Read to the Cabinet." It delighted Jackson, and even McLane had praise for Taney. Duane, however, stood his ground, refusing to obey or to resign. Thereupon the President sent the recalcitrant Secretary a curt note of dismissal. Taney's last official act concerning the bank before he was transferred to the Treasury was to furnish Jackson an official opinion on the power of the Secretary of the Treasury to select new depositories for the funds of the United States. On September 23, 1833, Roger Taney became Secretary of the Treasury and consequently had not only the privilege to advise but also the power to act.<sup>41</sup> The order designating certain state banks as depositories was promptly issued and the gradual task of drawing the government's money out of the United States bank began.

"I will refer to what tradition says occurred when Andrew Jackson proposed to remove the deposits," Senator George H. Williams, afterward to become Attorney General, said many years later. "Consulting with his Attorney General, he found that some doubts were entertained by that officer as to the existence of any law authorizing the Executive to do that act, whereupon Old Hickory said to him, 'Sir, you must find a law authorizing the act or I will appoint an Attorney General who will.'" This delightfully

<sup>40</sup> Jackson to Van Buren, Sept. 15, 1833, Bassett, *op. cit.*, V, 187; Jackson to Taney, Sept. 15, 1833, *id.*, 189.

<sup>41</sup> Swisher, *op. cit.*, 232; Van Buren, *op. cit.*, 608; Removal of the Public Deposits, Sept. 18, 1833, Richardson, *op. cit.*, III, 5-19; Jackson to Van Buren, Sept. 19, 1833, Bassett, *op. cit.*, V, 203; Jackson to Duane, Sept. 23, 1833, *id.*, 206; Taney to Jackson, Sept. 21, 1833, 2 Op. 584-586; Jackson to Van Buren, Sept. 23, 1833, Bassett, *op. cit.*, V, 207.

Jacksonian remark derives part of its interest from the fact that it is unqualifiedly false. Taney was an official subordinate, but hardly second in his opposition to the bank."<sup>43</sup>

When Taney took his post as Secretary of the Treasury, Jackson began at once to seek a new Attorney General. He insisted that the appointee be "right" on the Indian and bank questions. Van Buren advised against a hasty selection, although he had already brought the name of his former law partner, Benjamin F. Butler of New York, to Jackson's attention. The President, on Levi Woodbury's advice in which Van Buren concurred, first looked southward. The convictions and oratorical powers of both Chief Justice Thomas Ruffin of North Carolina and Judge Richard E. Parker of Virginia were investigated. Jackson finally offered the position to Peter V. Daniel, a son-in-law of Edmund Randolph, but though the appointment had been published Daniel declined."<sup>44</sup>

Finally Jackson, through Van Buren, tendered the post to the hitherto unreceptive Butler. Every argument which the Vice President could muster he urged upon his friend. The President needed him; Van Buren needed him. The office, unlike that of United States Senator, which Butler had also refused, would have no rough and tumble to displease his pacific nature. Professional prominence and fame, a Supreme Court practice equal to Webster's, and the chance to continue his connection with the high courts of New York Van Buren held out temptingly. Mrs. Butler, in spite of her earlier fears, would find Washington a satisfactory place for her daughters and Secretary Cass a never failing source of temperance talk. "Providence is always kind to me and orders all things for the best," Jackson wrote Van Buren on receiving Butler's letter of acceptance. "The letter of Mr. Butler is creditable to him—it is a display of that open candor, which always flows from great minds and pure hearts." "<sup>45</sup>

<sup>43</sup> Jan. 14, 1867, Cong. Globe, LXXIV, 439.

<sup>44</sup> Bassett, *op. cit.*, V, 207, 211-212; Jackson to Van Buren, Sept. 23, 1833, *id.*, 207; Van Buren, *op. cit.*, 605, 606; Daniel to Mason, July 19, 1845, Polk Papers, Lib. Cong.

<sup>45</sup> Van Buren to Butler, Nov. 8, 1833, Butler, *A Retrospect of Forty Years, 1825-1865* (1911), 39-43; Jackson to Van Buren, Nov. 16, 1833, Bassett, *op. cit.*, V, 226.

Thus there came to Washington a lawyer still under forty, whose main ambitions were professional rather than political. He had, however, other interests than his profession. There were Sunday school classes to be taught, a program of legal education to be formulated for the newly organized New York University, and a Board of Naval Officers to shock by a suggestion that the liquor ration be wholly abolished.<sup>44</sup>

Meanwhile, the termination of the deposit agency of the bank precipitated an economic and political storm. Biddle's policy of contraction, begun during the presidential campaign, received new impetus; and Jackson's foes in the "panic session" of 1833-1834 raged. Senator Clay moved to censure Jackson and Taney. Following a long and bitter debate ending on March 28, 1834, resolutions were adopted in modified form charging that Jackson had assumed authority not given him by the Constitution and laws and that Taney's reasons as Secretary of the Treasury for removing the deposits were unsatisfactory and insufficient. This act struck fire. Jackson turned to Amos Kendall and Attorney General Butler for aid, and Butler framed legal arguments for the President.<sup>45</sup>

The Senate had no constitutional power to pass such a resolution, said Jackson's *Protest*, sent to an irate Senate on April 15, 1834, for in so doing it had to all intents and purposes pronounced the President guilty of an impeachable offense, an action which it was not empowered to take unless the President was first charged by the House of Representatives and thereafter accorded trial according to constitutional prescription. Moreover, the President, far from violating the Constitution and laws by removing Duane and substituting Taney in order to insure the change in depositories, had merely performed his constitutional duty to take care that the laws be faithfully executed. He went on to expound powerfully the position of the executive and the authority of the President over the heads of departments.<sup>46</sup>

<sup>44</sup> On Butler, see his son's *A Retrospect of Forty Years, 1825-1865*, edited by H. A. Butler in 1911; Dict. Am. Biog., III, 356; Butler to the Board of Naval Officers, Mar. 26, 1834, Letter Bk. A-2, 324.

<sup>45</sup> Sen. Jr., 23 Cong. 1 Sess., 67, 197; Jackson to Kendall, April 1834, Bassett, *op. cit.*, V, 257-258.

<sup>46</sup> Richardson, *op. cit.*, III, 69-93.

Butler, too, came in for his share of the honors. Henry Clay on the Senate floor caustically pronounced "a high eulogium" on the personal character of the Attorney General. "Had he remained at Albany, I would have paid as much respect to any opinion of his on a question of law, delivered from his private office, as any man," said Clay. "But, brought within the pestilential atmosphere of Washington, I must be excused if I cannot accord full credit to his public opinions." \*\*

The cause of these remarks was Butler's opinion of February 3, 1834, holding it a palpable breach of duty for the Bank of the United States to refuse to obey an order of the Secretary of the Treasury by which the administration hoped further to reduce the agency of the bank. In pensioning Revolutionary soldiers, Congress had made the bank the agent of the government in the payment of pensions. The bank on two occasions early in Jackson's administration had successfully defended its legal right to the administration of the pension funds, convincing Secretary Cass upon this point.<sup>40</sup> Congress then determined to give the veterans the full monthly pay to which they had been entitled during their service, and for this the Secretary of War had made the bank the paymaster for the government.

When Cass, a new heretic from the bank's flock, finally demanded the transfer of these funds to the Girard Bank of Philadelphia, Biddle refused, maintaining that the bank could not comply without violating its statutory obligation with respect to pensions. Benjamin Butler met Biddle's arguments with the skill of a good lawyer fighting a doubtful cause. He cut Biddle's main ground from under him by declaring that these were not pensions but pay! Jackson had sent this opinion and Biddle's letter to Congress during the fight over Clay's resolution of censure.

"It is to be regretted that this attempt on the part of the bank to guide and direct the Executive upon the construction and execution

\*\* Feb. 4, 1834, Reg. of Debates, X, pt. 1, 463.

<sup>40</sup> Butler to Jackson, Feb. 3, 1834, 2 Op. 593-611; Acts of May 15, 1828 and June 7, 1832, 4 Stat. 269, 529; Joint Resolution of June 28, 1832, 4 Stat. 605; House Rep., IV, No. 460, 22 Cong. 1 Sess., 437-479, 481-489.

of an act of Congress should have been put forward and insisted on in a case where the immediate sufferers from their conduct will be the surviving veterans of the Revolutionary war," said the President with his rare sense for a good political argument, "for this evil falls exclusively upon the gallant defenders of their country and delays and embarrasses the payment of the debt which the gratitude of the nation has awarded to them, and which in many instances is necessary for their subsistence and comfort in their declining years." <sup>80</sup>

The House committee reported against the bank, the Senate for it. "And, in order to sustain this additional attack on the bank, and this most extraordinary assumption of legislative power," Representative Henry L. Pinckney of South Carolina remarked sourly, "have we not now a legal opinion from the Attorney General of which the object is to prove that the act of July, 1832, commonly called the mammoth pension act, and under which millions upon millions have been expended upon pensions, is, in reality, no pension law at all?" Webster advised Biddle that Butler's argument was weak. "But, after all, it is a bad subject to dispute about," said he. "The pensioners will not believe that the 'Old Soldier' is the cause of keeping back their money, therefore it would be better to give up the fund and the papers." <sup>81</sup> Nevertheless the bank kept custody of the half million in its possession.

On March 4, 1837, Jackson surrendered the Presidency to his resourceful friend Van Buren. Descending the Capitol steps, he may have regretted, as it is reported, that no chance had come to him to shoot Clay or hang Calhoun, but he felt no regret over his battle for the destruction of the second Bank of the United States. "Everyone that knows me, does know, that I have been always opposed to the U. States Bank, nay all Banks," he had written a fellow Tennessean, James K. Polk. <sup>82</sup>

<sup>80</sup> Van Buren, *op. cit.*, 603-604, 608; Biddle to Cass, Jan. 23, 1834, House Rep., II, No. 263, 23 Cong. 1 Sess., 22-27; Butler to Jackson, Feb. 3, 1834, 2 Op. 593, 600; Message of Feb. 4, 1834, Richardson, *op. cit.*, III, 40.

<sup>81</sup> Sen. Doc., II, No. 92, 23 Cong. 1 Sess.; House Rep., II, No. 263, 23 Cong. 1 Sess., 1-64; Pinckney, March 20, 1834, Reg. of Debates, X, Pt. 3, 3091; Webster, Catterall, *op. cit.*, 307-308.

<sup>82</sup> Bowers, *Party Battles of the Jackson Period* (1928), 480; Jackson to Polk, Dec. 23, 1833, Bassett, *op. cit.*, V, 236.

The tenacious Taney was not yet done with the bank. There remained one old account yet to be settled. The United States had sold the bank a bill of exchange drawn upon France, as a means of collecting the first installment due under a treaty of 1831 for Napoleonic spoliations of American commerce. But when the bank presented it, payment was refused by the French minister of finance because the French parliament had made no appropriation for the purpose. The bank promptly notified the Treasury that it held the United States liable for the principal plus interest, costs, exchange, and damages. Secretary McLane at once had directed the return of the principal to the bank, a simple matter since the United States had never withdrawn it. On the other items he had sought Attorney General Taney's advice. Taney immediately answered that all the charges except the \$136,534.88 claimed as damages were proper; for the damages, however, no foundation existed either in law or in equity. His reasons he withheld for a more convenient occasion, despite Biddle's demands. "I cannot," said Taney, "imagine that it is the duty of the counsel for the United States to argue this question for the satisfaction of the President and directors of the Bank, whenever they think proper to call on him to do so." "

Here the matter rested until, almost a year later, the bank renewed its demand. On being again rebuffed, the bank determined to take aggressive action by withholding the claimed damages from the government's dividend on its bank stock. Secretary of the Treasury Woodbury wrote sharply to Biddle; the whole affair would be reported to Congress and the President. Three months later Woodbury sought Attorney General Butler's opinion whether the bank's action was lawful; at the same time he desired a copy of Taney's reasons for his opinion of May 24, 1833."

"Convention of July 4, 1831, 8 Stat. 431; Act of July 13, 1832, 4 Stat. 574; Taney to McLane, May 24, 1833, Sen. Doc., I, No. 2, 23 Cong. 2 Sess., 47; Duane-Biddle and Duane-Taney correspondence, Sen. Doc., II, No. 17, 23 Cong. 2 Sess., and *Washington Globe*, Oct. 2, 1834; Taney to Duane, Aug. 16, 1833, Ms. Op. Bk. D, 72-73.

"Taney to Duane, Aug. 16, 1833, Sen. Doc., II, No. 17, 23 Cong. 2 Sess., 278; Smith to Taney, June 25, 1834, Jaudon's statement, and Woodbury to Smith, July 2, 1834, Sen. Doc., I, No. 2, 23 Cong. 2 Sess., 48-49; Biddle to Woodbury, July 8, 1834, *id.*, 49-50; Woodbury to Biddle, July 14, 1834, *id.*, 51; Woodbury to Butler, Oct. 17, 1834, A. G. Ms.

Taney, then enjoying a brief interim as a private citizen following the Senate's failure to confirm his appointment as Secretary of the Treasury, could no longer plead official duties as an excuse for delay. He gave Butler his grounds for finding the bank's claim invalid. First, the bank had suffered no actual damage beyond the mere costs of the transaction. Indeed, the money involved had never left the bank's custody. Second, the mere technical law would not support the claim. Finally, the protested bill was not in fact a bill of exchange in the accepted commercial sense of the term at all; the bank had been designated as a collection agent and the bill was a device designed only to make the transaction convenient."<sup>55</sup>

Shortly after receiving Taney's statement, Butler, in one of his typically thorough opinions, informed Woodbury that the bank's action in withholding the government's dividends was unjustified. The bank had arranged to continue its existence after 1836 under a Pennsylvania charter. In March 1838, the United States sued for the portion of the dividend withheld. The government won, and the bank took a writ of error to the Supreme Court."<sup>56</sup>

Jackson, meanwhile, had nominated Taney to the Supreme Court, but Senator Webster secured an indefinite postponement of action on the confirmation by a vote of twenty-four to twenty-one. Then Chief Justice Marshall died. "Impose a strong Republican control over this bench of Lords," one of Jackson's advisers had written in anticipation of this very event, "especially if you have the making of a Chief Justice, who is something like the president of a bank, all in all sufficient and prevailing in their privy councils." Jackson nominated the hated Taney, who was finally confirmed by a new Senate as the successor of Marshall."<sup>57</sup>

A few years later it fell to John Nelson, the third and least known of President Tyler's three Attorneys General, to argue the

<sup>55</sup> Butler to Taney, Oct. 21, 1834, Sen. Doc., I, No. 2, 23 Cong. 2 Sess., 52; Taney to Butler, Nov. 25, 1834, *id.*, 52-57.

<sup>56</sup> Butler to Woodbury, Nov. 28, 1834, 2 Op. 663-691; Butler to Woodbury, April 6, 1835, 2 Op. 710; Joint Res. of Mar. 3, 1837, 5 Stat. 200; report of Feb. 1, 1838, Sen. Doc., III, No. 158, 25 Cong. 2 Sess., 1; Gilpin to Read, Aug. 8, 1837, *id.*, 4.

<sup>57</sup> Swisher, *op. cit.*, 311, 312-314, 316-322.



cause of the United States against the bank in the Supreme Court. A Marylander, like Taney, Nelson had seen service in Congress and had gone to Naples as United States minister in 1831. Although an ardent Jackson man, he was not attached to the Van Buren leadership; hence he was an acceptable addition to the Tyler administration in its futile effort to control the Democratic Party. "I saw him once," wrote J. L. Petigru of South Carolina. "He looked Red to me a sort of Broadcloth democrat very likely to know a great deal and not likely to lose the benefit of what he knew by the predominance of the Imagination over that faculty so wonderfully brought to the view of the world by the Scotch metaphysicians under the name of common sense." "

Nelson argued against the bank's claim for damages over the French bill of exchange. Justice McLean gave the Court's decision in favor of the bank and directed a new trial. Justice Catron dissented. Then occurred an event singular in the history of the Supreme Court. Chief Justice Taney, who was too ill to attend after the early days of the term and who felt himself disqualified from sitting in the case on account of his earlier official connection with it, sent an opinion to the reporter with directions to publish it as an appendix to his reports."

"It is due to myself, and to the official station which I now hold," said the Chief Justice, "that the reasons should be fully understood upon which, in my judgment, the claim of the bank had no foundation in law or equity." He was irked by evidence in the record designed to show that, as Attorney General, he had refused to give the Secretary of the Treasury his reasons for denying the bank's claim for damages. "If the circumstance of my giving or refusing to give reasons was deemed to be a matter sufficiently material and important to be official in evidence at the trial, and spread upon the record," he wrote, "I can see no just reason why Mr. Bid-

" Nelson was born in Fredericktown, Md., in 1791, graduated from William and Mary College in 1811, and succeeded Legaré as Attorney General on Jan. 2, 1844. National Cyclopedia of Biography. VI, 8; Tyler, *Letters & Times of the Tylers* (1885), II, 269, 289; Petigru to Reid, Jan. 6, 1844, A. G. Ms.

" *Bank of the U. S. v. U. S.*, 2 How. 711 (1844); *id.*, page containing list of justices, n. (2); Taney to Howard, *id.*, 745.

dle's statement should have been selected as the testimony to be offered, and my own letters upon the subject withheld." He canvassed elaborately the entire history of the case. The bank's claim would yield it a clear profit of \$150,000 without having run any risk or suffered any inconvenience. "The treasury of the United States will be subjected to this heavy loss without any fault on the part of its officers, unless it be regarded as a fault to have consulted the bank and relied upon its counsel." Taney's reasoning brought him to four "irresistible" conclusions against the bank's claim.

This extra-judicial opinion transformed the whole situation. Instead of going back to the circuit court without hope of victory, the government went armed with formal advice from the Chief Justice of the United States. When the new trial came on in Philadelphia in November 1844, counsel for the United States requested Judge Randall to charge the jury in terms of Taney's four points. The trial judge refused, the jury found for the bank, and the government appealed.

When at last the case reached the Supreme Court again in 1847, Nathan Clifford, now Attorney General, assisted by former Attorney General Nelson, appeared for the government, but the voice of Taney speaking through his unofficial opinion of 1844 was more truly the counsel at the bar. With great propriety, Taney withdrew from the bench as did former Secretary Levi Woodbury, who also now sat among the justices. Justice Catron delivered the opinion of the Court in favor of the United States. "The changes on the bench show the uncertainty of life, and the emptiness of human hopes," lamented Justice McLean, dissenting for himself and Justice Wayne. "Two judges, distinguished for their great learning and ability, who participated in the former judgment, have gone to their account; ill health causes the absence of another, and the opinions of the two now present remain unchanged." \*\*

"The nation's honor was forfeited by the refusal to pay damages," says the bank's historian Catterall. Justice Catron and his three associates thought the bank sought an unwarranted profit of

\*\* *U. S. v. Bank of the U. S.*, 5 How. 382 (1847).

\$165,000."<sup>1</sup> In the interpretation of the Deposit-Distribution Act of 1836, Butler and his successor, Senator Felix Grundy, a loyal Jacksonian from Tennessee, wrote numerous opinions."

The administration of "Tippecanoe and Tyler, too" after the Whig triumph of 1841 began with a pro-bank, pro-Clay cabinet in which John J. Crittenden was Attorney General. Among those who urged the post on the Kentuckian was Senator Corwin of Ohio, who like most Whigs felt uneasy about the future and wanted some one he knew to be near President Harrison. "I dare say you will think all this *arrogant*," Corwin wrote Crittenden. "Well, be it so; but you ought to remember that I have made more than *one hundred* regular *orations* to the people this summer; that I have, *first and last*, addressed at least seven hundred thousand people, men, women, and children, dogs, negroes, and Democrats, inclusive; that I have made promises of great *amendments* in the administration of public affairs, and I do not wish to be made out liar, fool, or both, by the history of the first six months of the *new era*." Crittenden really wished to keep the Senate seat to which he recently had been elected, but on March 8 he qualified as Attorney General."

Although the Whig Party was not committed to the establishment of a national bank in the 1840 campaign, a promise was held out in the eastern states. But President Harrison died a month after his inauguration. The Whigs were a disharmonious combination from many sources, and their Vice President, John Tyler, was an old enemy of a national bank. He refused to be hitched to the Clay leadership, and profoundly disappointed the pro-bank elements by his veto of the fiscal bank bill on August 16, 1841. Attorney General Crittenden then took active steps to effect a compromise. Those who thought Tyler open to such a suggestion misjudged their man.

<sup>1</sup> Catterall, *op. cit.*, 302; *Bank of the U. S. v. U. S.*, *supra*, 741.

<sup>2</sup> Felix Grundy (1777-1840), Virginia born, rose to prominence in Kentucky as a lawyer and state legislator, associate judge and chief justice of the state court of errors and appeals. Moving to Tennessee, he made a remarkable record as a criminal lawyer. In Congress, he joined the war hawks of 1812. He and Jackson were never intimate, but Grundy as Senator from Tennessee supported Jackson and Van Buren. He served as Attorney General from Sept. 1, 1838 to Dec. 1839, resigning to return to the Senate. *Dict. Am. Biog.*, VIII, 32.

<sup>3</sup> Corwin to Crittenden, Nov. 20, 1840, Coleman, *Life of Crittenden* (1871), I, 130-131; Crittenden to Letcher, Jan. 11, 1841, *id.*, 138.

When a measure to create a fiscal corporation passed Congress, Tyler promptly vetoed that too.<sup>64</sup>

"After I saw he had some four or five Virginia schoolmasters around him, I confess I lost all hope," Kentucky's Governor Letcher had written Crittenden a few days earlier. All the cabinet, save Secretary of State Webster, resigned. "Do not prepare any of your sympathies for me," Crittenden wrote Letcher. "I am proud and happy, and as for all the losses and inconveniences that may come on me from the loss of my office, I shall bear them manfully, strengthened to do so by the consciousness that I have acted as honor and duty to the country required." Moreover, keen disappointment could be drowned in convivial conversation on the destruction of the last great hope of the friends of the bank. "Between the first and tenth of the next month I shall take a drink with you in your own house," Crittenden concluded. "Keep your bottles set out and full, and if your liquor be good and your entertainment the same, I will then give you all the particulars about the great affairs at Washington." <sup>65</sup>

<sup>64</sup> Veto Message of Aug. 16, 1841, Richardson, *op. cit.*, IV, 63-68; Crittenden to Clay, Aug. 16, 1841, Coleman, *op. cit.*, I, 159-160; Veto Message of Sept. 9, 1841, Richardson, *op. cit.*, IV, 68-72.

<sup>65</sup> Crittenden to Tyler, Sept. 11, 1841, Coleman, *op. cit.*, I, 165; Letcher to Crittenden, Sept. 3, 1841, *id.*, I, 161; Crittenden to Letcher, Sept. 11, 1841, *id.*, 165, 166.

## CHAPTER VII

### THE ROAD TO CONTINENTAL DESTINY

FROM the beginning of its history as an independent nation, the United States possessed a public domain always large and at times immense. The early Congresses sold millions of acres to private land companies. From these sales grew vexing problems of law which were referred to the Attorney General,<sup>1</sup> who narrowly missed being made head of the land office.<sup>2</sup> He was called upon for advice as to preemption, land patents, mineral lands, railroad and canal grants, and Indian lands. Congress also provided that no public funds should be expended to purchase sites for buildings or other public purposes except upon written opinion of the Attorney General certifying to the validity of title.<sup>3</sup>

The task of supervising appeals in public litigation over the three great bodies of private land claims, in the Louisiana Territory, the Floridas, and California, brought the Attorney General into the rôle of defender and protector of the public domain. The Louisiana Purchase added more than half a billion acres to the nation's estate. The government was immediately faced with the need of adjudicating the claims of settlers under French, Spanish, and British grants. In the most populated section, which ultimately became the state of Louisiana, one-sixth of the area was eventually confirmed to private claimants. In the whole of the Louisiana Purchase, there were between 13,000 and 14,000 such claims, aggregating about 7,000,000 acres. Title was asserted to immense tracts of valuable river lands, rich lead mines, and even to the site of the city of Dubuque, Iowa.<sup>4</sup>

Many of the claims were spurious, and there were remarkable dis-

<sup>1</sup> The Ohio-Scioto and John Cleve Symmes Companies in the north and the Yazoo Company in Georgia. Am. St. Papers, Public Lands, I, 23-24, 59-60, 115-119; Ann. Cong., III, 665; IV, 844-845, 1282-1283; V, 76, 100-101, 111; VI, 1874, 1914; XII, 1342-1352; Letter Bk. A-2, 144-145, 617.

<sup>2</sup> Ann. Cong., V, 420-422.

<sup>3</sup> Joint Res., Sept. 15, 1841, 5 Stat. 468.

<sup>4</sup> Sen. Docs., IV, No. 189, App. 140, 58 Cong. 3 Sess.; House Ex. Docs., XXV, No. 47, Pt. 4, 373-374, 46 Cong. 3 Sess.; *Chouteau v. Molony*, 16 How. 202 (1853).

closures.<sup>6</sup> The record in one of the earliest proceedings, which Attorney General Taney successfully resisted in the Supreme Court, opened before the country a picture of large scale land frauds in Arkansas. John J. Bowie, counsel in the case, represented 130 other claimants as well. "He had committed or procured the forgery of the name of the Spanish Governor, Miro, to the grants of land, and suborned the perjuries by which they had been supported," reported a congressional committee in 1835. "On filing the bills of review, a subpoena to answer thereto had been issued to each of the original petitioners, *not one of whom could be found*; and it was conceded, on the trial of the review, that no such persons existed, and that Bowie was the real and only party to the proceedings." A few years later District Judge Peck in Missouri charged that the Spanish authorities had made illegal and fraudulent grants by antedating both patents and surveys.<sup>7</sup>

Congress pursued a lenient and liberal policy toward the claims. The treaty for the cession of Louisiana did not expressly protect the native land titles, although there was a general statement as to property rights. In 1805 Congress had provided registers and recorders for land titles. Three commissions were to examine claims, each with a "law agent" to represent the interests of the government. Many statutes continued this system for the next thirty years and more. "This long series of acts," wrote Secretary of the Treasury Crawford, "presents an uninterrupted and uniform course of relaxation in favor of land claimants of every description." In the Missouri and the Arkansas Territories, Congress in 1824 provided that claimants might present their cases to the courts and that the district attorneys should protect the interests of the United States. The Attorney General was empowered to take an appeal to the Supreme Court in cases involving more than 1000 acres.<sup>8</sup>

This brought new duties upon Attorney General Wirt. On August 8, 1826, District Attorney Roane of Arkansas sent him four transcripts of cases decided by the superior court of the territory.

<sup>6</sup> Am. St. Papers, Public Lands, III, 239, 243, 250; V, 433, 436-438; Roane to Wirt, May 7, 1828, A. G. Ms.

<sup>7</sup> *Sampbeyreac v. U. S.*, 7 Pet. 222 (1833); Am. St. Papers, Public Lands, VII, 667; *id.*, VIII, 797-847, and see also VI, 225-249.

<sup>8</sup> *Id.*, III, 393; 2 Stat. 324, Mar. 2, 1805; 4 Stat. 52, May 26, 1824.

Wirt characteristically demanded that the district attorney provide, as the law specified, a "statement" of the facts and the "points of law" on which the cases had been decided. The man who refused to accept great bundles of undigested papers submitted by cabinet members could not permit greater privileges to the lesser law officers. Roane attempted to comply, but Wirt was not satisfied. "All the circumstances necessary to a clear apprehension of the controversy," he directed, should be included in the statement. "A general reference to the Spanish and French law is not enough; the reference ought to be specific and precise." The Attorney General finally concluded to take appeals. "It will be desirable," he thought, "to have the course of decision and practice under this act settled by the authority of the Supreme Court."

His decision came too late. With one exception, the territorial court refused to permit the appeals, on the ground that the time limit of one year within which to give notice of appeal had expired. Wirt blamed Roane. "This dark, perplexed and unknown branch of the local law of provincial Spain," he had expected, "would be fully and clearly developed, so as to enable a legal mind to come to a just conclusion on every title." The House of Representatives investigated, and the Attorney General directed the district attorneys to file notices of appeal automatically in all cases decided against the government, thus affording a safe period in which it could be decided whether to complete the appeals.<sup>6</sup>

Wirt came to the end of his twelve-year term as Attorney General in March 1829, and it fell to his successor Berrien to begin the defense in the Supreme Court. The Missouri and Arkansas cases were concluded by the middle of Attorney General Butler's term, and in 1844 the act of 1824 was revived for five years and extended to include the lands within the State of Louisiana and portions of Mississippi and Alabama.<sup>7</sup>

This produced another group of land cases for the Supreme Court. Attorney General John Young Mason, whom Hawthorne once called a "fat-brained, good-hearted, sensible old man," was the

<sup>6</sup> Am. St. Papers, Public Lands, VI, 129-135.

<sup>7</sup> 5 Stat. 676, June 17, 1844.

only member of Tyler's cabinet, where he had headed the Navy Department, to be retained by President Polk. A typical tidewater Virginian, Mason had served in Congress as a Jacksonian and had been a federal judge. In Congress and afterward his principal public service was in the field of foreign affairs and diplomacy.<sup>10</sup> As Attorney General he at first took the view that the Solicitor of the Treasury should determine whether appeals should be taken in the land cases, but District Attorney Downs of Louisiana convinced him otherwise. Mason then directed that notices of appeal be filed in all cases, thus avoiding Wirt's grievous experience.<sup>11</sup>

Many suits were instituted in the district courts under the second act. "The government enters upon this kind of litigation at a very great disadvantage," complained the Solicitor of the Treasury. "The claimant takes his own time to prepare his case and institutes his suit when he believes it to be in such a condition as will enable him to recover. Prior to its commencement, the United States know nothing of his intentions; nor can they easily learn the facts which are to be urged against them. The testimony that may exist in favor of the government is often unknown to any of its officers. Except what may be derived from the General Land Office, little information can be obtained. Hence the trials so often result in favor of the claimant."<sup>12</sup>

John J. Crittenden resigned the governorship of Kentucky to become Attorney General for the second time on July 22, 1850, when President Fillmore reorganized Taylor's cabinet. Long one of the outstanding Whigs, Crittenden had served Kentucky in the state legislature and in the United States Senate repeatedly. Although less known as a lawyer than as a politician and statesman, he had distinguished himself at the bar in both criminal and civil litigation and would have joined the justices of the Supreme Court of the United States had not President-elect Jackson's friends once prevented his confirmation. Closely allied with Henry Clay until 1848, Crittenden

<sup>10</sup> Mason served from Mar. 6, 1845 to Sept. 9, 1846, and later served briefly under an *ad interim* appointment. He died in 1859 at the age of 60. Dict. Am. Biog., XII, 369-370; Hawthorne, *Nathaniel Hawthorne and His Wife* (1885), II, 174.

<sup>11</sup> Downs to Barton, April 21, 1846, and enclosure, A. G. Ms.; Mason to Durant, Oct. 9, 1846, Letter Bk. A-2, 592; Clifford to Durant, June 7, 1847, *id.*, 606.

<sup>12</sup> Sen. Ex. Docs, IV, No. 36, 30 Cong. 2 Sess., 4, 58.



possessed many of the qualities which characterized Kentucky statesmanship in national politics in the years before the Civil War.<sup>13</sup> He met the flood of land cases with a remarkable record, winning all of the twenty-six which reached the Supreme Court during his term and saving nearly two million acres for the public domain.

In all some fifty cases reached the Supreme Court involving lands included in the Louisiana Purchase. The Maison Rouge claim for the enormous area of thirty square leagues in upper Louisiana rested on a forged certificate of survey. The Clamorgan grant covered 536,000 acres on the Mississippi in Arkansas. The assignees of Baron de Bastrop claimed one hundred and forty-four leagues in Louisiana. The Boisdoré heirs demanded from 100,000 to 400,000 acres in Mississippi. All were defeated.<sup>14</sup>

In 1819 Spain had ceded Florida to the United States. The eighth article of the treaty contained a specific pledge concerning land claims. Congress provided much the same system for settling titles as it had in Louisiana. The Florida claims, like those in Louisiana, were to a discouraging extent attended by circumstances of irregularity and fraud. "There was near ten times the quantity of land granted, in the year 1817, and from that time until the year 1821," reported the government's chief counsel in Florida, "than had been granted, previously, during the whole period of the occupation of that province by Spain, commencing in the year 1783." One of the members of the land commission in East Florida resigned in disgust in 1824, a year after beginning his work. He accused his colleagues of accepting employment as counsel in cases which were before the commission for adjudication. He further charged that they had kept the commission's records in a grossly negligent and careless manner and that they had refused to examine original title papers.<sup>15</sup>

<sup>13</sup> Crittenden continued as Attorney General until Mar. 3, 1853. He had his legal training in the office of George M. Bibb whom he appointed clerk in the Attorney General's office. On Crittenden, see Coleman, *Life of Crittenden* (1871); Dict. Am. Biog., IV, 546.

<sup>14</sup> *Maison Rouge*: *U. S. v. King*, 3 How. 773 (1845), 7 How. 833 (1849); *U. S. v. Turner*, 11 How. 662 (1850); *U. S. v. Cox*, 17 How. 41 (1854). *Clamorgan*: *Glenn v. U. S.*, 13 How. 250 (1851). *Bastrop*: *U. S. v. Philadelphia and New Orleans*, 11 How. 609 (1850). *Boisdoré*: *U. S. v. Boisdoré*, 7 How. 658 (1849), 8 How. 113 (1850), 11 How. 63 (1850).

<sup>15</sup> 3 Stat. 709, May 8, 1822, and 4 Stat. 284, May 23, 1828, as amended; 8 Pet. App. 721; and see Am. St. Papers, Public Lands, VIII, 252, III, 766-767, IV, 759.

Thomas de Aguilar, Secretary of the Spanish Government in Florida, affixed his signature to certificates of copies of alleged grants, the originals of which were said to be lost. These were presented to the commissions and the courts as evidence of grants by the Spanish governors, and in some instances enormous areas were thus confirmed until a new commission in 1830 rejected several large and suspicious grants resting on de Aguilar's certificates.

The most flagrant of the false certificates purported to verify grants made by the Spanish governor White. "We consider him the most correct governor who has ever presided in East Florida," said the new East Florida commission when a claim came before them, "the most strictly observant of the laws, and the most parsimonious of the public lands, and we do firmly believe that if his example had been followed by his successors, *and if his name had never been signed after his death*, there would now be no confusion in the land titles of East Florida." The case involved more than 350,000 acres. "We do not believe that he," concluded the commission with scorn, "made a grant, *when living*, of 20,000 acres to one individual, whatever he may have done since dead."<sup>16</sup>

Attorney General Wirt in 1828 advised the President to employ special counsel to assist the district attorneys in Florida and direct the collection of all the Spanish and French ordinances affecting the titles in Florida and elsewhere. This was done. General Richard Keith Call, formerly receiver for one of the Florida commissions and later to be governor of Florida, was charged in 1829 with the responsible task of representing the government. He was to be paid \$500 in each case for his services in the lower court and \$1000 in each case in the Supreme Court. Colonel Joseph M. White began the collection of the Spanish and French land ordinances, and the government sent a commissioner in 1832 to Havana, Cuba, to examine the archives there.<sup>17</sup>

The Supreme Court decided about fifty Florida cases, involving

<sup>16</sup> *Id.*, VI, 97.

<sup>17</sup> Wirt to Adams, July 26, 1828, A. G. Op. (Gilpin ed.), *op. cit.*, 615, 616; Taney to Jackson, Mar. 22, 1832, Letter Bk. A-1, 326; Wirt to Douglass, April 1, 1829, 2 Op. 191; Richardson, *op. cit.*, II, 428; Butler to McLane, Jan. 15, 1834, Letter Bk. B, 1.

an immense area of nearly 15,000,000 acres. The government won complete victories in eighteen and partial victories in nine others, nearly 2,000,000 acres being confirmed to claimants and 12,750,000 acres being thus saved for the public domain of which 12,000,000 acres were involved in a single case. Among these cases were many of the greatest historical interest and of wide fame in their day.

Some involved large grants alleged to have been made for services rendered the Spanish government. Nearly all of these were supported by no other documentary evidence than certificates signed by the notorious de Aguilar. Notable in this group was the claim of Pedro Miranda for 368,640 acres bordering on Tampa Bay, for which the land commission in East Florida reserved its most caustic comments in its report of 1830. The district court confirmed 46,080 acres to Miranda, but the Supreme Court held that the grant was too vaguely described to permit accurate survey and severance from the public domain. The South Carolinian, Hugh Swinton Legaré, whom Tyler named Attorney General after the resignation of Crittenden, had argued the case. He was an accomplished legal scholar, who had studied abroad under Irving and Savigny. For him questions of foreign law held no terrors.<sup>18</sup>

The most famous Florida claim was that of Fernando de la Maza Arredondo and Son, Havana merchants. The grant covered an area of 289,645 acres in the county of Alachua, about 52 miles west of St. Augustine, with the present site of the city of Gainesville as its center. It embraced nearly the entire northeastern coast of Florida, including Jacksonville and other cities. It had been obtained on a promise to establish within three years a community of two hundred Spanish families for "the growing of cattle and the culture of provisions."

The Arredondos petitioned the district court in November 1828 to confirm their title. Only certified copies of the original papers were presented in evidence. There had been little or no attempt at

<sup>18</sup> *U. S. v. Miranda*, 16 Pet. 153 (1842). Legaré served from Sept. 13, 1841 to June 20, 1843, dying in office at the age of forty-six. His previous public career had been limited to a minor diplomatic post, a single term in Congress, and the attorney generalship of his state. On Legaré see Rhea, *Hugh Swinton Legaré* (1934); Dict. Am. Biog., XI, 144.

colonization. As an excuse for not establishing the colony, it was urged that Indian hostilities had for a long time prevented it and that the American cession had made it utterly impracticable to introduce two hundred Spanish families into Florida. The district court confirmed the grant, and the United States appealed.

A distinguished array of counsel argued the case in the Supreme Court. General Call, former Attorney General Wirt, and Attorney General Taney represented the government. Former land commissioner White, who had collected the Spanish ordinances for the United States and who was to become the foremost land lawyer in Florida, former Attorney General Berrien, and Daniel Webster appeared for the private claimants. Considerable parts of the lands were in the hands of American speculators. The government attacked the claim as fraudulent, denied the legal power of the Cuban army intendant to make the grant, argued that the lands were within the Indian boundary and not subject to grant, and stressed most heavily the failure to establish a colony.

The Supreme Court, in a decision which served as the most important legal precedent of the entire body of Louisiana, Florida, and later California land cases, rejected all of these arguments. The treaty and the acts of Congress were to be liberally construed, the acts of foreign public officers were presumed to be lawful, and the explanation for the failure to establish a colony was accepted. The entire grant of 289,645 acres was confirmed to the Arredondos and their assignees. Three years later the Supreme Court passed on a claim to 1,200,000 acres comprehending all the seacoast between the Apalachicola and St. Mark's rivers, a territory including the present Franklin, Wakulla, and Liberty counties and a United States fortress. With the exception of the fortress, the claim was confirmed.<sup>10</sup>

The most breath-taking of all the Florida claims, however, embraced an area of 12,000,000 acres, or about 20,000 square miles—one-third of the entire state of Florida. The claim rested on a royal grant to the Duke of Alagon. This grant, together with some others, each for several millions of acres, had been made by the King of

<sup>10</sup> *U. S. v. Arredondo*, 6 Pet. 691 (1832); *Mitchel v. U. S.*, 9 Pet. 711 (1835).

Spain to noblemen shortly before the American cession. Virtually the entire royal domain in the Spanish Floridas had thus been distributed. The United States insisted that these grants be revoked, and the treaty had so provided. It was argued that the King of Spain had no authority to annul his own grant, by treaty or otherwise. "These are political questions and not judicial," said Chief Justice Taney for the Supreme Court in denying the claim. "They belong exclusively to the political department of the government."<sup>20</sup>

The California land claims, which arose after the Mexican cession, were both spectacular and troublesome. On one side stood the American settlers and squatters, who had poured into California after the discovery of gold, and the United States government whose title to various properties was at stake. On the other side stood the Spanish and Mexican claimants, whose 813 claims covered 19,148 square miles of land, more than 12,000,000 acres. "They involve the title to an area of country larger than that contained within the jurisdictional limits of almost any one of the older of the states of the Union," said the land commissioners sent to adjudicate the titles. "They embrace the choice portions of California."<sup>21</sup>

Congress, faced with one of the most difficult tasks in its history and with a menacing condition in California, had provided a mode of settlement more liberal than was required by the treaty of Guadalupe Hidalgo. By a statute of 1851, the decisions of a land commission were to be reported to the district attorney. Within six months the United States or any claimant could appeal to the district court and the Supreme Court. The next year, however, the Attorney General was made responsible for the appeals to the district courts as well as to the Supreme Court. This, for the first time, brought the nation's chief law officer into extensive trial court responsibilities.<sup>22</sup>

The board finished its duties in March 1856, having decided all the 813 claims. Copies of the record in each case were sent to the Attorney General. Here was an overwhelming amount of work,

<sup>20</sup> *Doe v. Braden*, 16 How. 635 (1853).

<sup>21</sup> Report to Sec. Int., Oct. 17, 1854, see clipping in A. G. Ms.

<sup>22</sup> Malloy, *Treaties* (1910), 1119; 9 Stat. 631, Mar. 3, 1851; 10 Stat. 99, Aug. 31, 1852; Bancroft, *Works* (1888), XXXV, 396-403; Sen. Ex. Doc. 60, 30 Cong. 1 Sess., 3-37, 46-50, 69-70; *U. S. v. Castillero*, 2 Black 82 (1862).

which bore heavily upon the Attorney General's office at Washington. The district attorneys, judges, and clerks of court were also hard put to keep abreast of trials."

Attorney General Caleb Cushing, who bore the early brunt of the California cases, had stood with Webster in support of President Tyler after the veto of the bank and fiscal corporation bills in 1841. Some years later he passed into the Democratic party, and he was one of the small group of men who made Franklin Pierce President. At fifty-three, his career had included membership in Congress, a mission to China, and service on the supreme judicial court of Massachusetts from which he had resigned to enter the cabinet."<sup>42</sup> He found his office staff utterly inadequate to meet the business which every mail brought from California. Additional clerks were employed and paid from various funds, until in 1856 Cushing sought and secured a special appropriation. The clerical force, most of whom were known as "law assistants," increased from two to about twenty at the crest in 1857."<sup>43</sup>

These law assistants were a pivot in the procedure for settling the California land claims. Their duties began when the transcript lay in the Attorney General's office awaiting action on appeal from the commission to the district courts. The entire record in hundreds of cases had to be carefully examined. They made hundreds of reports. "In the course of the careful investigation which all the cases received," wrote Cushing, "elaborate memoirs, discussing as well questions of law as of fact, were prepared, in leading cases, by the accomplished and learned jurists." There was also a new liaison with the district attorneys in California, despite three thousand intervening miles. At Washington, with great difficulty, Spanish and Mexican law books had to be secured, translated, and studied. Indeed the Supreme Court refused to proceed with cases until a reasonably com-

<sup>42</sup> Transcripts are in A. G. Ms. files; Cong. Globe, 33 Cong. 2 Sess., 175.

<sup>43</sup> Cushing served from Mar. 7, 1853 to Mar. 3, 1857. On Cushing see Fuess, *Caleb Cushing* (1923); Dict. Am. Biog., IV, 623.

<sup>44</sup> Cushing to Pierce, April 15, 1853, A. G. Ms.; Cushing to McClelland, April 29, 1856, *ibid.*; Whittlesley to Cushing, May 31, 1854, *ibid.*; see memorandum of costs paid by R. S. Spofford from June 1 to 12, 1855, *ibid.*; account current on account of temporary law assistants, Mar. 1854 to June 1856, *ibid.*; Cushing to Campbell, Aug. 4, 1856, *ibid.*; 11 Stat. 115, Aug. 18, 1856; House Ex. Doc. 84, 36 Cong. 1 Sess., 41-45.

plete collection should be assembled. Cushing finally sent one of his clerks to Mexico City, using money borrowed from the Department of State. There the clerk met with little cooperation from the Mexican government, still smarting from the sting of defeat, and discovered that the needed books were rare and expensive. "He seemed a little disappointed when I assured him that he would return to the U. S. without the novel and delightful sensation of being robbed," wrote the American consul at Vera Cruz. "The vigorous government of Santa Anna has suppressed the gentlemen of the road almost entirely." \*\*

There was considerable delay occasioned by this sudden increase of business. California's Senator Gwin impatiently asked that one appeal be dismissed. "I recognize the hardship to claimants, and the public inconvenience in other respects, of protracted litigation in this peculiar class of cases," Cushing replied. "But I can see that it would not be judicious or proper for me to forego the most complete investigation of the earliest of the cases which come up; and I therefore feel constrained to proceed." In the first case, the Supreme Court decided that the suit had been improperly tried in the northern district of California since the disputed land lay in the southern district. This caused a bit of a stir among the government's legal forces. In the second case, Cushing was successfully opposed by his erstwhile chief clerk, George M. Bibb. A short time before, Bibb had resigned from the Attorney General's staff as "a matter of delicacy" and Cushing had accepted the resignation "with lively regret." \*\*

The third case to reach the Supreme Court brought a story of romance and high adventure to the Attorney General's files. In 1844, Juan B. Alvarado was granted, with conditions of occupation and cultivation, a tract of land of ten square leagues known as Las Mari-

\*\* Cushing to Pierce, Mar. 4, 1857, 8 Op. 515. *District attorneys*: Black to Stanton, July 19, 1858, Letter Bk. B-2, 1. *Books*: Cong. Globe, 32 Cong. 1 Sess., Pt. 2, 1145; Cushing to Spofford, Jan. 5, 1854, A. G. Ms.; Marcy to Cushing, June 16, 1854, *ibid.*; Cushing to Gadsden, Black, Cripps, and Pickett, Jan. 5, 1854, *ibid.*; Pickett to Cushing, Jan. 21, 1854, *ibid.*; Black to Cushing, Feb. 2, 1854, *ibid.*; 10 Stat. 295, May 31, 1854; 11 Stat. 115, Aug. 18, 1856.

\*\* Cushing to Gwinn, Dec. 3, 1853, A. G. Ms.; *Cervantes v. U. S.*, 16 How. 619 (1853); *U. S. v. Ritchie*, 17 How. 524 (1854); Bibb to Cushing, Jan. 16, 1855, Cushing Papers, Lib. Cong.; Cushing to Bibb, Jan. 16, 1855, *ibid.*

posas, lying within vague boundaries. He had never settled on or cultivated the land. In fact he had not even surveyed it. The reasons given for this neglect were the intense hostility of the warlike Indians in that area and the civil war in California. The land was of unusual richness and beauty, and Alvarado maintained his intention to occupy it as soon as practicable.

In 1847, for \$3000, Alvarado conveyed the tract to J. C. Frémont, the famous American soldier and explorer who afterward became a candidate for the Presidency. Frémont made an attempt to occupy the land, but military duties interfered. Another effort was made in 1849. Indians killed six of the forty men. Eventually, Frémont succeeded in establishing a cattle farm, but as late as 1853 the Indians continued to threaten the settlement.

The commission confirmed the claim, and the district court rejected it. Frémont appealed to the Supreme Court, where the case was argued in 1855. Cushing, appearing for the United States, spoke four hours. "His plea was of extraordinary strength and brilliancy," said the *Sacramento Daily Placer Times and Transcript*, "most fully engrossing the attention of the Court, the bar, and all hearers." He maintained that at the time of the treaty in 1848 the Alvarado grant remained "a mere naked initiatory concession, upon paper" which could not now support the claim. "There had been no survey; no plan; no occupation; no site even; no confirmation by the proper public authority; no performance of any of the conditions precedent or subsequent annexed to the grant," he argued. "Such is the extraordinary pretension of paper title."

"The pretension of location is yet more extraordinary," he continued. "It is of a right to locate a tract of land, ten square leagues in dimension, anywhere at the discretion of the grantee, and in any form of combination of the subdivided sectional parts, so that they touch one another, within a region of upwards of one hundred square leagues." But the Court, speaking through Chief Justice Taney, with Justices Catron and Campbell in dissent, held that Frémont's claim was valid.

Thereafter, the case took still another turn. Frémont claimed lands on which rich gold mines had been developed. President Pierce



received a memorial dated November 1, 1855, signed by one hundred and twenty settlers who demanded the removal of the surveyor general in California, William C. Hayes. The signers charged Hayes with clandestinely surveying the Frémont grant under the ruse of laying out the township lines. They said that Hayes had purposely avoided vacant lands, at least one hundred leagues of which were available, and had located the grant wholly upon mineral lands "which embrace the most densely populated district of this part of the mines." Hayes was also charged with having extended the location far beyond the confirmed boundaries, "the Survey being wholly in the Sierra Nevada Mountains and the grant only allowing the running to said mountains." However, in finally locating his floating grant, Frémont was able to include several mines. In the ensuing disturbances several lives were lost. The Supreme Court confirmed the survey.\*\*

At the 1855 term of the Supreme Court, five more California land cases were decided in favor of the claimants. Justice Daniel wrote a vigorous dissent. "The decisions," said he, "are subversive alike of justice and of the rights and the policy of the United States in the distribution and settling of the public lands,—of the welfare of the people of California, by inciting and pampering a corrupt and grasping spirit of speculation and monopoly." He was convinced that there was widespread fraud in California. "Principalities are won by an affidavit." He sympathized with the individual settler. "I can perceive no merit, no claim whatsoever, to favor, on the part of the grasping and unscrupulous speculator and monopolist; no propriety in retarding for his advantage or profit, the settlement and population of new States, by excluding therefrom the honest citizen of small means, by whose presence and industry the improvement and wealth, and social and moral health, and the advancement of the country are always sure to be promoted." \*\*

\*\* *Fremont v. U. S.*, 17 How. 542 (1854), 18 How. 30 (1855); *Sacramento Daily Placer Times and Transcript*, A. G. Ms.; Memorial to Pierce, Nov. 1, 1855, *ibid.*; Browne, *The Mariposa Estate* (1868), 6; California land transcript, Case No. 1, 2-4, A. G. Ms.

\*\* *Arguello v. U. S.*, 18 How. 539, at 550-553 (1855); *U. S. v. Reading*, 18 How. 1 (1855); *U. S. v. Cervantes*, 18 How. 553 (1855); *U. S. v. Vaca*, 18 How. 556 (1855); *U. S. v. Larkins*, 18 How. 557 (1855).

At the next term two more appeals resulted in decrees for the private claimants. One, in which Chief Clerk Gillet appeared for the United States against former Chief Clerk Bibb, involved the sites of Berkeley and Oakland, and the seacoast "for many leagues up and down with several flourishing towns." The previous spring, however, his record of consistent defeats had moved Cushing to change the government's policy. Appeals had come to be taken in all cases in which the United States lost before the land commission. Cushing now determined to reexamine all the transcripts to determine which of these appeals to prosecute. He decided to carry eighty-one cases to the district courts for review and to dismiss four hundred thirty-four cases.<sup>10</sup>

A strong feeling of dissatisfaction prevailed among the claimants whose claims the government sought to contest. That a great deal of costly and perhaps avoidable trouble was caused to some who could ill afford it cannot be doubted. The settlers, on the other hand, resented ejection from the lands without compensation for the improvements they had made. So indefinite were many of the boundaries that often it was impossible to distinguish public from private land. Another cause of complaint among the settlers arose from "floating" grants. The settlers in meetings denounced these abuses, and the legislature sent resolutions to Congress.<sup>11</sup>

Henry George, the famed single-taxer, stormed against the evil. "The Mexican grants were vague, running merely for so many leagues within certain natural boundaries, or between other grants, although they were generally marked out in rough fashion. It is this indefiniteness which has given such opportunity for rascality," he wrote. "As soon as settlers began to cultivate farms and make improvements, the grants began to float. The grant holders watched the farmers come into their neighborhood, much as a robber chief of

<sup>10</sup> *U. S. v. Peralta*, 19 How. 343 (1856); *U. S. v. Sutherland*, 19 How. 363 (1856); Carpenter to Cushing, Dec. 10, 1855, A. G. Ms. Portfolio, 1855; Hawes to Cushing, July 5, 1856, *ibid.* *Change of policy*: Circular, April 2, 1856, 7 Op. 672; Cushing to Pierce, Mar. 4, 1857, 8 Op. 515; Gwinn to Cushing, Mar. 5, 1856, A. G. Ms.

<sup>11</sup> See Cong. Globe, 31 Cong. 1 Sess., 1438, and 32 Cong. 1 Sess., 1129-1130, 2033-2038; Ellison, *California and the Nation* (1927), 11, 18-19; Report in the Legislature of California, No. II, A. G. Ms.; Mott to Cushing, Aug., 1856, *ibid.*; Morrison to Cushing, July 1, 1855, *ibid.*; New York *Daily Tribune*, Aug. 14, 1856; Sacramento *Morning Globe*, July 4, 1856.

the Middle Ages might have watched a rich Jew taking up his abode within striking distance of his castle. The settler may have been absolutely certain that he was on Government land, and may even have been so assured by the grant-holder himself; but so soon as he had built his house and fenced his land and planted his orchard, he would wake up some morning to find that the grant had been floated upon him, and that his lands and improvements were claimed by some land shark who had gouged a native Californian out of his claim to a cattle run, or wanting an opportunity to do this, had set up a fraudulent grant, supported by forged papers and suborned witnesses." "

Jeremiah Sullivan Black, who succeeded Cushing when Buchanan became President, had occupied since the 1830's a leading place in his profession. At the time of his appointment on March 6, 1857, he was widely known as a shrewd and sound advocate and as an able judge of Pennsylvania's supreme court." The decisions of the previous two years in the California land cases had deprived the government of most of its arguments. Black was faced with the necessity of finding new legal weapons if he intended to protect the interest of the United States in lands of great extent and enormous value. As a lawyer and judge he was accustomed to argue or decide upon large principles rather than nice technicalities. For the California cases he found such an argument based on long suspected fraud.

José Y. Limantour, a Frenchman, in 1853 had filed eight claims covering about one thousand square miles of land. One of these claims, for four square leagues, included the city of San Francisco. Another extended to islands in San Francisco Bay and elsewhere upon which the United States was erecting fortifications and lighthouses. The public property involved in these two claims alone was estimated at \$12,000,000 and the private property at \$36,000,000."

On January 22, 1856, the land commission rejected six of Liman-

" George, *Our Land and Land Policy* (1871), 14.

" Dict. Am. Biog., II, 310; Brigance, *Jeremiah Sullivan Black* (1934); Clayton, *Reminiscences of Jeremiah Sullivan Black* (1887); Black, *Essays and Speeches* (1883); Black to Van Dyke, Nov. 15, 1856, Black Papers, II, 47471-2, Lib. Cong.

" California land transcripts, Cases No. 549, 715, 780, 781, 782, 783, 784, A. G. Mss.; *U. S. v. Limantour*, 1 Hoffman (N. D. Cal.) 389-451; printed transcript in Case No. 548, Dept. of Justice Library; House Ex. Doc. 84, 36 Cong. 1 Sess., 3.

tour's claims but confirmed the two to lands in San Francisco and islands in the bay despite the damaging testimony of one Auguste Jouan, an associate of Limantour. Panic seized the property owners in San Francisco. This had its humorous side. "When the claim comes up in the United States Court, there is no doubt that it will be rejected," one enterprising merchant reassured the people. "In the meantime, let all parties keep perfectly composed; and when they desire any of the following articles, go to No. 142 Sacramento street, where they will get them at New York and Boston prices: Best English Brussels Tapestry; Best English Velvet Tapestry; Ingrain Assorted Tapestry." "

In April 1857, Black received several letters from Jouan offering testimony against Limantour. Jouan had for months been offering his services to Cushing, who had ignored him. Black at first took no more notice than had Cushing. Then Jouan wrote that he had altered the date on some of the Limantour papers. Within a few weeks Jouan was on a steamer bound for San Francisco, in the company of P. Della Torre, district attorney for the northern district of California."

In July Limantour was reported to have returned from Mexico with new iron-bound proofs to support his claim. The French diplomatic corps in Mexico was suspected of backing Limantour in his successful "search" of the Mexican archives. As the hearing of testimony in the district court began, the situation for the government grew worse. Many of the property holders were compromising with Limantour. Witnesses were intimidated and refused to testify. Others asked generous douceurs. Della Torre had to proceed with caution and secrecy in his investigation to avoid Limantour's spies."

In October 1857, Black appointed Edwin M. Stanton of Ohio as special counsel to handle the Limantour case. He was already a lawyer of national reputation. Brilliant, industrious, painfully thor-

"Public Opinion in the Limantour Claims (Jan. 1856), A. G. Ms.; Bancroft, *History of California* (1888), VI, 554-555; clipping, A. G. Ms.

"Worcester to Cushing, July 12, 1856, A. G. Ms.; Memoranda by Jouan, Sept. 8 and 9, 1856, *ibid.*; Jouan to Cushing, Sept. 27 and Oct. 3, 1856, *ibid.*; Jouan to Black, April 12 and 19, 1857, Black Papers, V, Lib. Cong.; Jouan to Black, May 18, 1857, *id.*, VII; Della Torre to Black, June 16, 1857, *id.*, VIII.

"Della Torre to Black, July 4 and 20, Aug. 20 and Sept. 4, 1857, A. G. Mss.

ough and precise, he had argued before Black in the Pennsylvania courts." His fee was to be \$25,000 and he was directed to proceed to California to work with Della Torre in any cases in the district courts but particularly the Limantour claim.

Stanton arrived in San Francisco on March 19, 1858, and after a single day spent in introductions began his work. He had formed a plan to make a complete survey of the Mexican archives. The surveyor general had only a portion of them. Stanton conducted a wide search for the missing records. "Many of the most important were scattered over the State, some in the custody of unauthorized officers, some in the possession of individuals, and others in boxes which nobody guarded, and which had never been opened," Black reported to President Buchanan. "They were collected in the different towns and pueblos, wherever they could be found, from Sacramento to San Diego."

Evidence of theft of portions of the archives was unmistakable. "Today I found a collection of the reports by the local jurisdiction to the Governor, extending from 1838 to 1846," Stanton reported to Black. "The reports from the 'Gusgados' of San Francisco, *are gone for the years 1842 and 1843*, and from the completeness of all the others I have no doubt they have been abstracted. I have also found two books of the Treasurer Alivigo, but the year 1843 is *cut out*. There would have been no trace left in the archives if there had been sufficient knowledge where to look. The very confusion and disorder of the mass of papers in the Archive office has no doubt been the means of preserving what remains—and that will prove sufficient for our purpose."

Stanton then began to sort the mass of papers. "I have six book binders at work—two clerks, and Mr. Harrison, Mr. Buchanan, Eddie and myself from eight in the morning to six in the evening." He notified Black of the need for three translators, who could not be had for less than ten or fifteen dollars per day. "I do not mean to spend a single dollar to buy up Mexican or Spanish witnesses—I would not spend a cent for a regiment of them," he assured the Attorney Gen-

<sup>11</sup> Dict. Am. Biog., XVII, 517; Gorham, *Life and Public Services* (1899), II; Flower, *Edwin McMasters Stanton* (1905). Stanton served as Attorney General from Dec. 20, 1860 to Mar. 3, 1861.

eral. "But I want labor that must be paid for and will be worth to the government a hundredfold more than it costs."

Eighty-nine days Stanton spent in unremitting labor, arranging and studying these records. They were then assembled in four hundred large folio volumes, the most important documents being translated and printed. A large number of photographic exhibits were bound together for the use of the courts and the Attorney General, and these reproductions were of great service in the Limantour case. "They are the most expensive and valuable work that has been done," Stanton wrote on September 5, 1858. "They constitute an epitome of the Mexican and Spanish archives, 265 in number, and will cost about \$4,000. They will afford you and the several departments of the government the means of knowing what the archives are, the forgeries that have been committed, the means of detecting them, and will protect about two thousand square leagues of land."

"In the face of these all Mexico may perjure itself at leisure," he concluded. "A lie can't be made the truth, as these photographs will prove." Stanton went even further. "There was also compiled a faithful chart of all the professional witnesses, or persons supposed to have hired themselves out to do the business of swearing the false claims through," Black reported to Buchanan. "Tolerably full biographies of nearly all the men who have been engaged in these schemes of imposture and fraud, from the governors down to the lowest of the suborned witnesses, can now be furnished whenever necessary." \*\*

On the completion of his work on the archives, Stanton desired to return. Black persuaded him to remain until the Limantour claim should have been defeated. At the trial, Limantour once more produced seemingly authentic documents and unimpeachable witnesses. The archives evidence proved the paper on which several of Limantour's documents were written to be of a style not in existence at the time of the grants. The seals proved to be counterfeit. Signatures had been forged. In addition Jouan revealed that Limantour possessed eighty blank titles signed by Governor Micheltorena, one of

\*\* House Ex. Doc. 84, 36 Cong. 1 Sess., 1-3, 31, 32; Gorham, *op. cit.*, 51-54, 65; Stanton to Black, April 16, 1858, Black Papers, Lib. Cong., XVII.

which Jouan produced in court. Limantour's lawyers abandoned the case. Judge Hoffman handed down the inevitable decision on November 19, 1858. "The fraud I think is the most daring and ingenious," exulted Della Torre, "and its exposure the most complete that the annals of jurisprudence can furnish." Limantour fled the country.<sup>40</sup>

The disclosures in the Limantour claims and Stanton's researches in California made the element of fraud a major factor, where before it had been unimportant. The government had new-found strength with which to fight other fraudulent claims, and this it proceeded to do under the direction of Attorney General Black.

During the remainder of Black's term the bulk of his work in the Supreme Court consisted of California land cases, which continued to crowd the court docket and the Attorney General for another twelve years. This meant again, as under Cushing, a large volume of additional labor and new expenses for the Attorney General's office. A total defense fund of \$289,000 was appropriated by Congress from 1856 to 1866. The Attorney General began to hire special counsel, a practice which grew.

In *United States v. Cambuston*, Black's first case before the Supreme Court, he defeated as fraudulent a claim to eleven square leagues on the Sacramento river. He had not argued a case for fifteen years. "I really did think I would carry Cambuston," wrote his opponent. "It was my unlucky destiny to meet the keenest of weapons just when it was keenest and before it had cut down anything else or had its edge turned."<sup>41</sup>

At the next term Black defeated the Sutter title for twenty-two leagues, in a case which climaxed riots and intense feeling among the Californians who had settled on the lands. "In justice to Captain Sutter, whose name is historical, I ought to add that he is not believed to have fabricated the claim himself," Black reported to the Presi-

<sup>40</sup> Black to Stanton, Aug. 18, 1858, Letter Bk. B-2, 24; Transcript, Case 548, D. J. Library; Della Torre to Black, Nov. 19, 1858, A. G. Ms.; *U. S. v. Limantour*, 1 Hoffman (N.D. Cal.) 389; Della Torre to Black, Dec. 4, 1858, A. G. Ms.; *Reese v. U. S.*, 9 Wall. 13 (1869); Bancroft, *op. cit.*, VI, 554-555.

<sup>41</sup> *Cambuston v. U. S.*, 20 How. 59 (1857); Campbell to Black, Jan. 26, 1858, Black Papers, Lib. Cong., XV.

dent, "nor did he voluntarily assert its genuineness, but he was the dupe and the instrument of others." <sup>43</sup>

In one case, when Black successfully appeared against former Attorney General Johnson and former Chief Clerk Gillet, testimony was offered to show that District Attorney Ord of California had used his office to further his own claims. Other phases of the matter were kept before the courts and Congress for thirty years by one McGarrahan, and the case even achieved literary fame in Bret Harte's *Story of a Mine*.<sup>44</sup> Another claim, which embraced three leagues in the heart of San Francisco, Black successfully resisted as fraudulent. An unfounded rumor spread that Black and Stanton had been bribed with \$100,000 to dismiss the appeal; this led to some excitement.<sup>45</sup> In another case one Luco, whose counsel was Caleb Cushing, unsuccessfully demanded the enormous area of fifty leagues. "Owing to the weakness of memory with regard to the dates of grants signed by them," said the Supreme Court, "the testimony of the late officers of [the Mexican government in California] cannot be received to supply or contradict the public records, or to establish a title of which there is no trace to be found in the public archives." <sup>46</sup>

"The value of the lands claimed under grants ascertained to be forged is probably not less than \$150,000,000," Black reported to Buchanan in 1860. "More than two-thirds of them in value have already been exposed and defeated." <sup>47</sup> In December Black became Secretary of State, and Stanton became Attorney General. On Black's return to private life in 1862, after serving as reporter for the Supreme Court, he became the foremost of the land lawyers. Other former and future Attorneys General and their subordinates also found this an attractive field of private practice.

In 1862 Black, with former Justice Benjamin R. Curtis, appeared for the government in the famous case of *United States v. Castillero*.

<sup>43</sup> *U. S. v. Sutter*, 21 How. 170 (1858); House Ex. Doc. 84, 36 Cong. 1 Sess., 34.

<sup>44</sup> *U. S. v. Gomez*, 23 How. 326 (1859), 1 Wall. 690 (1863), 3 Wall. 752 (1865), and *Secretary v. McGarrahan*, 9 Wall. 298 (1869); Bancroft, *op. cit.*, VI, 553.

<sup>45</sup> *U. S. v. Bolton*, 23 How. 341 (1859); Thorne to Black, June 19, 1858, Black Papers, Lib. Cong., XVII; Black to Thorne, July 17, 1858, *id.*, XVIII; Thorne to Buchanan, June 19, 1858, *id.*, XVII.

<sup>46</sup> *Luco v. U. S.*, 23 How. 515, 543 (1859).

<sup>47</sup> House Ex. Doc. 84, 36 Cong. 1 Sess., 30-40.



Years earlier, the United States had entered a protracted struggle for a quicksilver mine which Black, when Attorney General, had described as "surpassing in richness every other mine on the globe." He had reported to Buchanan, "The mine belongs to the public. We are the trustees of the public and will surrender it to no one." The government would not hesitate to play one claimant against another. "Each has therefore been willing to furnish documents, produce evidence, and make arguments against the other," Attorney General Black had written. "They have been permitted to do so." <sup>47</sup>

The claimant, parading as a martyr to official greed, stirred deep feeling. Black reciprocated in kind. "If this rich mine is to be given away, what reason can be assigned for bestowing it on these men in particular?" he asked the President. "They are foreigners; why should American citizens be excluded from the bounty of their government? If we must go abroad to find objects for the exercise of our liberality we might find many who are friendly in their feelings and respectful in their behavior, but these persons have insulted our laws, defied our authorities, sought to embroil us by putting the property in dispute under British protection while we were at war with Mexico, and one of their confederates avowed his intention 'to give the Yankees as much trouble as possible.'" <sup>48</sup>

"Among other things I am accused of suspending the laws like Charles II and copious quotations are made from Macauley to show how aggravated and enormous is the crime of which I have been guilty," he wrote to Secretary of State Cass. "Of course, all this is very silly and does not call for any notice of mine—I have no idea that I need a defence against such absurd puerilities. I am no more like King Charles than Andres Castillero and his accomplices are like honest men." <sup>49</sup>

As the date for the trial in the district court drew near the mining company in possession redoubled its efforts to influence public opinion. "Social influence," wrote government counsel from San Francisco, "balls, dinners, suppers, old wine, rare segars and juicy birds,

<sup>47</sup> Black to Buchanan, Mar. 28, 1859, 9 Op. 320, 329.

<sup>48</sup> Della Torre to Black, Nov. 19 and Dec. 4, 1858, A. G. Ms.; Black to Buchanan, July 12, 1860, Letter Bk. B-2, 479.

<sup>49</sup> Black to Cass, Oct. 11, 1859, Letter Bk. B-2, 322.

has been plied in this city, with immense effect. For one man who is capable to comprehend the justice of a case like this, or curious to understand its details, there are a thousand whose digestion is perfect, appetite excellent and whose relish for a good dinner is nowise impaired by the reflection that it is possible it has been paid for with stolen money." <sup>80</sup>

The district court confirmed the mining claim of the company. Black and Curtis, now private citizens, appeared as special counsel for the government in the Supreme Court and won. But Black, who had started the game of playing one claimant against the other, was already counsel for another claimant to the same property. Having aided the government—and his own client—in disposing of the company's claim, two years later with Caleb Cushing he appeared against the United States and won the prize he had once so glowingly described as public property. His fee, it is said, was \$180,000, the largest of its time.<sup>81</sup> By 1870 the California titles had nearly all been settled. A few dragged on. In 1880, of the 813 claims, 612 stood confirmed, 178 rejected, 19 discontinued, and 4 were still pending.<sup>82</sup>

<sup>80</sup> To Black, Nov. 9, 1860, A. G. Ms.

<sup>81</sup> *U. S. v. Castillero*, 2 Black. 17 (1862); *U. S. v. Fossat*, 20 How. 413 (1857), 21 How. 445 (1858); *U. S. v. Berreyes's Heirs*, 23 How. 499 (1859); *The Fossat Case*, 2 Wall. 649 (1864); Bancroft, *op. cit.*, 555-560; Brigance, *op. cit.*, 143.

<sup>82</sup> Bancroft, *op. cit.*, VI, 570 n.

## CHAPTER VIII

### MINISTER WITHOUT PORTFOLIO

By 1850 it had become common to speak of the "Attorney General's Department" or the "Department of Law," and the roots of the movement to collect together under the Attorney General all the various executive officers and activities primarily concerned in the administration of justice extended back as far as Edmund Randolph's day.

The system of independent local federal law officers created by the Judiciary Act had soon revealed its weakness. It was desirable that some officer at Washington, other than the President, have some measure of authority over the district attorneys. Washington's department heads, Randolph informed him in 1791, made frequent requests that suits in the several states be prosecuted under the Attorney General's direction. Moreover, other trials in which no department had an interest might seriously affect the United States. Randolph suggested legislation—a recommendation which Washington transmitted to Congress. There a committee reported favorably, and a bill was drafted clearly establishing the official primacy of the Attorney General. It would authorize him to instruct district attorneys, require reports, or participate in any case; and they in turn were empowered to ask official advice. However, the measure got no further.<sup>1</sup>

Lacking any single agency at Washington authorized to direct the conduct of litigation, the departments themselves maintained relations with the district attorneys. But even the request of a Secretary lacked the positive quality of an instruction, which could come only from the President who took matters of importance into

<sup>1</sup> Randolph to Washington, Dec. 26, 1791, *Am. St. Papers, Misc.*, I, 46; Message of Dec. 28, 1791, *id.*, 45; *Ann. Cong.*, 2 Cong. 1 Sess., 331.

his own hands as had Jefferson in the Burr conspiracy.\* After he began to reside at Washington, the Attorney General could have attained a very extensive control. Wirt, with a living to make and a reluctance to assume duties beyond those expressly prescribed by law, finally came to the view that not even the fact that a case might ultimately become the Attorney General's charge in the Supreme Court would justify his assuming to give advice or directions for its proper conduct in the trial court.†

Yet there were many instances of the actual association of the district attorneys and the Attorney General in the trial courts at the President's request. So Randolph went to the Yorktown circuit court in 1792 and attended the trial of Gideon Henfield the next year.‡ Rodney participated in the early stages of the Burr trial,§ and Wirt was frequently at Baltimore and once at Philadelphia.¶ All of these cases were of more than ordinary importance. Most of them attained the somewhat vague status of "state trials"—politically of great concern to the United States. In the ordinary run of cases the Attorney General did not intervene.†

The close of the War of 1812 found the United States sadly in need of a plan to settle annually the public accounts and to provide better control of public expenditures. The Senate instructed the department heads to report such a plan, and the secretaries in 1816 proposed an improved method of handling fiscal matters, the establishment of a Home Department, and the creation of a "Solicitor of the Treasury" to assume the responsibility of directing suits for the recovery of debts due the United States.\* But not until 1820 did Congress provide that some officer of the Treasury, to be designated by the President, should be its "agent" with authority to direct

\* Adams, *Gallatin's Writings* (1879), I, 334, 388, 393, 427; Ann. Cong., 5 Cong. 3 Sess., App. 3141-3142; Beveridge, *op. cit.*, III, Chs. 7-9, especially at 390, 430-432; Richardson, *op. cit.*, I, 417.

† Wirt to Monroe, Jan. 17, 1818, Letter Bk. A-2, 3; Wirt to Crawford, April 11, 1823, 1 Op. 608, 613.

‡ Hamilton, *op. cit.*, IV, 588; Wharton, *op. cit.*, 78.

§ Robertson, *Burr Trials* (1808), I, 3, 8.

¶ At Baltimore for the trial of mail robbers in 1818, Kennedy, *op. cit.*, II, 70. Piracy and neutrality prosecutions, Dec. 1818, Am. St. Papers, Misc., II, 932; Prosecution of slave traders, 1826, Clay to Wirt, May 16, 1826, A. G. Ms. At Philadelphia for the prosecutions in the *Tea Cases*, Sec. Rush to Wirt, April 4, 1827, A. G. Ms.

\* Legaré to Collinshree, Oct. 25, 1842, Letter Bk. A-2, 545.

† Am. St. Papers, Misc., II, 396-399.

and superintend suits for the recovery of money or property of the United States. The district attorneys were to conform to his instructions.\*

To assume these duties President Monroe chose Stephen Pleasanton, the overworked Fifth Auditor of the Treasury.<sup>10</sup> Some district attorneys sought minute directions, even to the question of pleadings. Such problems, doubtless, were distasteful to "the extremely amiable and gentlemanly" Pleasanton, for he was not a lawyer; and he probably was relieved when Attorney General Wirt ruled that the Agent need only instruct district attorneys when to proceed, and not how to proceed.<sup>11</sup>

The Agent could ask the opinion of the Attorney General through the Secretary of the Treasury and, in his absence, directly. Some correspondence on legal and non-legal points passed between the two officers, but Wirt made no effort to build up authority over the Agent and through him over the district attorneys.<sup>12</sup> The contacts between Agent Pleasanton and the local law officers bulked large. "With every clerk, every marshal, every attorney of the United States and their Territories, he is in constant correspondence," said Representative Pearce in the House. In 1828 more than three thousand law suits were pending, over which the Agent of the Treasury was expected to exercise surveillance.<sup>13</sup>

President Jackson, impressed by the failure of the Treasury to make headway in recovering debts, in his first annual message, in 1829, called the attention of Congress to the fact that supervision of law suits by an accounting officer of the Treasury operated unfavorably. He recommended that these duties be transferred to the Attorney General, who should be placed on the same footing as the heads of other departments, "receiving like compensation, and

\* Acts of Mar. 3, 1817, 3 Stat. 3; May 15, 1820, *id.*, 592; Ann. Cong., XXXV, 70, 477, 577, 695; XXXVI, 1808, 1819, 1820, 2249.

<sup>10</sup> 3 Stat. 366, Mar. 3, 1817; Register of Debates, IV, 1088-1089, 1238.

<sup>11</sup> Wirt to De Silver, June 9, 1823, Wirt Letter Bk. IV, Lib. Cong.; Wirt to Crawford, April 11, 1823, 1 Op. 608, 612-613.

<sup>12</sup> *Id.*, 608; Wirt to Pleasanton, Aug. 23, 1824, 1 Op. 694; Wirt to Pleasanton, Oct. 10, 1828, Letter Bk. A-2, 199; Wirt to Pleasanton and Wirt to Duer, May 4, 1828, *id.*, 193-195.

<sup>13</sup> Register of Debates, IV, 1088-1089, 1238.

having such subordinate officers provided for his Department as may be requisite for the discharge of these additional duties." And, he added, the Attorney General should be given superintendence of all federal criminal proceedings.<sup>14</sup>

Congress now had before it for the first time in definite form a proposal to create a law department. True, these responsibilities had been suggested previously. A resolution introduced into the Senate in 1819, about the time that Wirt was succeeding so well in Baltimore, had urged that all criminal prosecutions be placed under the Attorney General's direction and proposed creating the office of Assistant Attorney General. A House committee in 1822 had advised that the Attorney General exercise the powers allocated to the Treasury Agent. These ideas had been kept alive in Congress.<sup>15</sup>

The Senate Judiciary Committee brought in a bill designed to meet the needs of the Treasury and stave off the creation of a Home Department. The business of the Patent Office, the superintendence of the publication of the laws, and the functions of the Agent of the Treasury were to be assigned to the Attorney General who was to head the new law department.

Daniel Webster led the opposition. He knew the existing departments had outgrown their establishments. He knew too that the Treasury agency was working imperfectly. The way to meet the first difficulty was to create a Home Department; the second could be overcome by correcting the existing arrangement in the Treasury. If the law department bill should pass, Webster saw in the Attorney General a fractional monstrosity, "a half accountant, a half lawyer, a half clerk—in fine, a half of everything and not much of anything."<sup>16</sup>

The Judiciary Committee proposed a substitute which eliminated the supervision of the Patent Office and the responsibility for publishing the laws, leaving only those provisions making the Attorney General a department head charged with the duties of the Agent

<sup>14</sup> Richardson, *op. cit.*, II, 453-454.

<sup>15</sup> Ann. Cong., XXXIII, 176, 190; Am. St. Papers, Military Affairs, II, 420; Register of Debates, IV, 1089.

<sup>16</sup> Register of Debates, VI, Pt. 1, 276-277, 322-324.

of the Treasury. Even this modified plan could not survive Webster's motion to table the bill.<sup>17</sup>

Webster brought in a bill providing for a Solicitor of the Treasury, learned in the law—an office which the secretaries had recommended fifteen years earlier and which had existed in England since the mid-seventeenth century—to take over the duties assigned to the Attorney General by the second law department bill. Senator Dickerson of New Jersey sought to send Webster's bill to the Judiciary Committee with orders to amend it by assigning the duties to the Attorney General. Webster could muster enough votes to prevent this, but he could not secure a third reading for his own bill; and for the moment it appeared that neither measure would pass. Such circumstances breed compromises. Some days afterward Senator McKinley of Alabama brought in an amendment making it the duty of the Attorney General "to advise with and direct" the proposed Solicitor of the Treasury. Thus amended, the bill passed the Senate. The House added the words, "at the Solicitor's request," which rendered the Solicitor as independent of the Attorney General as any member of the cabinet. In this form the bill became law.<sup>18</sup>

The act empowered the Solicitor to instruct the district attorneys, marshals, and clerks of the lower courts in all matters and proceedings in which the United States was interested. He might become the chief of all civil litigation of the United States in the lower federal courts.

To his duties the first Solicitor, Virgil Maxcy, who had once desired the first comptrollership as a reward for his support of Jackson's presidential aspirations, brought both energy and ability. Though supposedly a Calhounite, appointed to his post partly to heal the growing breach between Jackson and the great South Carolinian, Maxcy continued in his office until President Van Buren,

<sup>17</sup> Sen. Jr., 21 Cong. 1 Sess. (1829-1830), 276-277, 278. Among those who voted against Webster's motion were Senators Felix Grundy, who a few years later became Van Buren's Attorney General, and George M. Bibb, who in his old age became chief clerk in the Attorney General's office.

<sup>18</sup> Sen. Jr., 245, 280, 299-300, 313, 315; House Jr., 21 Cong. 1 Sess., 784; 4 Stat. 414, May 29, 1830; Howard, *Criminal Justice in England* (1931), 54.

in 1837, gave him a diplomatic post.<sup>10</sup> He directed a campaign to enforce the custom laws and recover debts due the government.<sup>11</sup> He gave the district attorneys a central source of direction and advice and provided some degree of uniformity in the management of federal civil litigation throughout the land.<sup>12</sup> However, over one class of civil litigation the Solicitor had no jurisdiction. Actions brought for debts due the Post Office Department Congress in 1836 had placed under the supervision of the auditor for the Post Office.<sup>13</sup>

The Attorney General and the Solicitor of the Treasury conducted their business most amicably. The older officer recognized the virtual independence of the newer one. The Solicitor, on his part, admitted that once the Attorney General's advice had been invited and given it was to be followed.<sup>14</sup> During the years in which the Attorney General was housed in the Treasury building, conference between the two law officers was easy and informal.<sup>15</sup>

However, the existence of the solicitorship of the Treasury was not destined to terminate the demand for a department of law. Indeed President Jackson himself in his second annual message was convinced that the public interest would be greatly promoted by giving the Attorney General general superintendence over the various law officers and interests of the government, allowing him at the same time such compensation as would enable him to devote his undivided attention to the public business.<sup>16</sup>

Congress ignored Jackson's advice, and not until the eventful administration of James K. Polk, fifteen years later, did a President again recommend a law department. Polk reminded Congress in

<sup>10</sup> Dict. Am. Biog., XII, 434; Cong. Globe, XCI, Pt. 4, 3034-3035.

<sup>11</sup> Register of Debates, VII, App. Ix; Sen. Ex. Doc., IV, No. 36, 30 Cong. 2 Sess., 6, 82.

<sup>12</sup> Register of Debates, VII, App. Ix-Ixii; and see general rules and regulations to be observed by district attorneys, clerks, marshals, and collectors, Nov. 20, 1848, Nos. 16 and 17, A. G. Ms.

<sup>13</sup> 5 Stat. 80, July 2, 1836.

<sup>14</sup> Taney to Maxcy, Mar. 13, 1832, Letter Bk. A-2, 261; Report of Gillet, Feb. 24, 1849, Sen. Ex. Doc., IV, No. 36, 30 Cong. 2 Sess., 2.

<sup>15</sup> Black to Hillyer, Dec. 12, 1857, A. G. Ms.; Black to Hillyer, Mar. 11, 1858, Letter Bk. A-3, 190-191; Black to Hillyer, Feb. 15 and Mar. 8, 1858, Letter Bk. A-2, 729-730, 743-746.

<sup>16</sup> Message of Dec. 6, 1830, Richardson, *op. cit.*, II, 527-528; Sen. Doc., I, No. 1, 21 Cong. 2 Sess., 28.



1845 that the Attorney General's duties had been augmented by the growth of the country and the acts of Congress authorizing suits against the United States for large areas of valuable public lands. He, like Jackson, recommended that the Attorney General be placed on the same footing with the heads of the executive departments and given such subordinate officers as were required to discharge the additional duties."

A bill appeared in the Senate under the sponsorship of former Attorney General Berrien and in the House under that of Representative Rathbun of New York, the Chairman of the Judiciary Committee. In addition to renewing the earlier proposals to increase the Attorney General's salary, the bill also would transfer the Patent Office and the issuance of commissions to judges and law officers from the Department of State to the Law Department. The most important feature of the bill made it the duty of the Solicitor of the Treasury "to act in subordination to the Attorney General." Friends of the measure pointed out that this provision corrected an anomalous state of affairs, by which the second law officer was subordinated, not to the first, but to the Secretary of the Treasury.

Representative Bowlin of Missouri denounced the Rathbun bill as a "mere scheme to cover an increase of salary—as perfect a humbug as he had ever witnessed." The debate degenerated into an argument as to whether the bill, which added a chief clerk to the Attorney General's staff, was not a device to increase the openings for deserving Democrats; and finally, the session being far advanced, the whole proposal was tabled."

Six years later, in 1851, Alexander H. H. Stuart, Secretary of the recently established Interior Department in the cabinet of President Fillmore, suggested a "Department of Justice." The Interior or Home Department, created with the reluctant approval of President Polk on the last day of his administration, exercised supervision of the accounts of the subordinate law officers—district attorneys, marshals and clerks of court." Stuart disliked this supervision

" Dec. 2, 1845, Richardson, *op. cit.*, IV, 415.

" Cong. Globe, XV, 613, 873, 881, 1130-1131, 1133, 1134.

" Act of Mar. 3, 1849, 9 Stat. 395; Short, *National Administrative Organization* (1923), 213.

which brought him into close contact with judicial administration."

The organization of the Interior Department had removed a legislative rival and relieved the future law department bills of the catch-all provisions which had characterized former proposals. More than that, it emphasized the illogical dispersion of the administration of justice through the six executive departments.

At the very time Secretary Stuart was recommending a department of justice, new duties were finding their way into the Attorney General's office. The first was the laborious portion of pardon administration, the main responsibility for which had long rested with the Secretary of State whose office received all applications, conducted the necessary investigation, and issued and recorded pardon warrants. In this business the Attorney General had from the first an important share, passing upon pardon applications along with or even independently of the Secretary of State. Daniel Webster, now Secretary of State under President Fillmore, and Attorney General Crittenden agreed that the petitions should pass wholly into the Attorney General's charge, although warrants should still issue from the State Department. Hardly had this transfer been achieved when Congress passed the California Land Claims Act making the Attorney General responsible for the proper conduct of some eight hundred complicated cases involving Mexican title claims against the United States. "

At this juncture Caleb Cushing became Attorney General. In the brilliant cabinet of Franklin Pierce, among such men as Jefferson Davis and William L. Marcy, Cushing was not overshadowed. Versatile and abounding in energy, he was "a drestle smart man" as James Russell Lowell said. William Wirt, one of the most energetic of his predecessors, had leaned backward in holding his functions to the strict letter of the law; Cushing pressed forward to absorb new duties. A less ambitious man would have despaired at the

" Report of Sec. Int., Nov. 29, 1851, Sen. Ex. Doc., II, No. 1, Pt. 2, 32 Cong. 1 Sess., 509; Ann. Rep. Sec. Int. to Pres. Fillmore, Dec. 4, 1852, Sen. Ex. Doc., I, No. 1, 32 Cong. 2 Sess., 49. Stuart also proposed the creation of the office of solicitor for the Interior Department.

" Foster to Miller, Jan. 11, 1893, Pardon Attorney Ms. Dept. Justice; 10 Stat. 99, Aug. 31, 1852.

avalanche of business which flowed into his office from California. Cushing welcomed it, secured the personnel essential to its disposition, and looked about for more.

Wisely, he accepted only duties relating to the administration of justice. In consultation with the President and Secretary of State Marcy, he arranged to continue the management of applications for pardons, and added to this the handling of correspondence relating to judicial and legal appointments. He agreed, moreover, to take over such other legal correspondence as the department heads might see fit to turn over to him.<sup>11</sup>

Within a year forces began to assemble for a new drive to enact a law department bill which would enable Cushing to claim statutory sanction for the structure that had grown up around his office. In this the leadership was assumed by Senators Adams of Mississippi, Badger of North Carolina, and Isaac Toucey, the former Attorney General, members of the Senate Committee on Retrenchment and Reform. What changes, the committee asked the Attorney General early in 1854, were in his opinion necessary "to simplify or expedite the transaction of public business in your Department and to harmonize the business between the Departments?"<sup>12</sup> Here was an opportunity for an ambitious man.

Cushing did not reply directly to this letter for some months. Instead, he submitted to President Pierce a remarkable state paper entitled the "Office and Duties of Attorney General," which the President promptly transmitted to Congress.<sup>13</sup> Cushing brilliantly discussed the theory and organization of the executive branch of the government, the departmental duties and functions, the relation between the President, the department heads, and Congress, the scope of executive authority, and finally the place, duties, and character of the Attorney General's office. He treated his office as an executive department and occasionally called it such.

Taking it as obvious that in theory the Attorney General had "superior charge" of the law business of the government, Cushing suggested modifications to translate theoretical into real and effec-

<sup>11</sup> Cushing, *Faneuil Hall & Newburyport Speeches* (1857), 38.

<sup>12</sup> Adams to Cushing, Feb. 1, 1854, A. G. Ms.

<sup>13</sup> House Ex. Doc., XI, No. 95, and Sen. Ex. Doc. VIII, No. 55, 33 Cong. 1 Sess.



CALEB CUSHING  
From a Portrait in the Department of Justice



tive responsibility. With the historic functions of the office, he had no quarrel; minor changes would perfect them. But there was one great class of cases which, he suggested, should be placed by law, rather than presidential order, under his direction. These were cases ultimately concerning the United States to which, however, the government was not formally a party of record. Such cases were likely to involve the political interests of the United States, or the validity of its land patents, or its title to public property, or the acts of its subordinate officers in the execution of the laws.

Cushing also endorsed Secretary Stuart's recommendation that judicial accounts and the issuance and recording of commissions to law officers be transferred from the Interior and State Departments to the Attorney General. Lastly he proposed that the Attorney General be required to report annually to Congress, including in the report all his opinions to executive officers, a device which would lead to the official publication of opinions.

The House Judiciary Committee invited him to reduce his suggestions to the form of a bill, which he promptly did. The Cushing draft reaffirmed the position of the supporters of the 1846 bill, by proposing to place the Solicitor of the Treasury under the supervision of the Attorney General. The Solicitor should be known thereafter as the Solicitor of the United States and his functions expanded to cover all civil litigation in which the United States might be interested. Supplementary to the control over district attorneys which the subordination of the Solicitor would assure, Cushing suggested that the Attorney General be empowered to call upon them for information relative to reprieves, pardons, and litigation generally, as he was already doing.<sup>84</sup>

No bill was proposed by the House Judiciary Committee, but Senator Adams and his Committee on Retrenchment and Reform on July 1, 1854, brought in a bill to establish a Department of Law. The six sections organizing the law department were the joint work of Senators Adams, Badger, and Toucey. Toucey's ideas dominated, but the influence of Cushing's report was plain. Two sec-

<sup>84</sup> Stanton to Cushing, June 23, 1854, A. G. Ms.; Cushing to Stanton, June 26, 1854, *ibid.*

tions, however, were unacceptable to Cushing. He, who found in Chief Clerk Bibb an adequate assistant, felt that an Assistant Attorney General, which the measure proposed, was unnecessary and that the Attorney General himself ought to appear for the government in the trial courts without special compensation.

If Senator Adams expected little opposition to the bill, he was disappointed. Senator Weller of California attempted unsuccessfully to shunt the bill into the Judiciary Committee, and, although it thus escaped rewriting, it received but one more consideration amid the legislative competition which characterized the short session. Senator Lewis Cass of Michigan denounced as dangerous the provision transferring the supervision of the accounts of legal officers from the Interior to the law department. Such a power should never have been given to the Secretary of the Interior, Cass said, and the Attorney General ought not to have it. On this note, with the promise of future consideration, the bill was held until the Thirty-Third Congress was no more."

Nevertheless, President Pierce, in the summer of 1855, determined to attain one of Cushing's suggested reforms by executive order. For the convenience of the departments and the systematic dispatch of business, he directed that all cases arising in any of the departments should be conducted either by the Attorney General or, if he should prefer, by the head of the department concerned, but in either case with the aid of the Solicitor of the Treasury." The entire civil legal business of the government was thus to be reduced to systematic control, and the responsibilities of both principal law officers were to be increased.

Senator Adams reintroduced his measure early in the first session of the Thirty-Fourth Congress. Again consideration went over to the short session, when a new and influential opponent appeared. Former Attorney General, now Senator, John J. Crittenden condemned the bill as ill considered. Declining to rely on his own experience in the office, he quoted William Wirt to the effect that no human intellect could perform the duties imposed upon the

" Sen. Bill 426, Sen. Jr. (1853-1854), 472; Cong. Globe, XXX, 69-70, 95, 148; Cushing to Adams, Dec. 23, 1854, A. G. Ms.

" Pierce to Cushing, July 16, 1855, *ibid.*

Attorney General. "Now, sir," remarked Crittenden, "although I think there has not been a proportionate advance in the human intellect since that day, we are for crowding on that office various other laborious and important duties, requiring personal attention." If it seemed best to transfer additional duties to the Attorney General, the President, Crittenden assured the Senate, was perfectly competent to do it. This formidable opposition coupled with the demands of some members for more time to study the bill terminated the debate.

With the expiration of the Pierce administration and the retirement of Cushing, the drive to give "a name and legal form to what already exists," as Senator Adams put it, came to an end."

Curiously—or perhaps not so curiously—Congress, although it had steadily refused to create a law department, had not been loath to assign additional duties to the Attorneys General. Between 1789 and 1870 they were assigned many special legal functions, such as counseling treaty commissioners," advising the Solicitor of the Treasury," examining the titles of all lands purchased by the United States," as well as the defense and settlement of claims and other duties with respect to public lands," the adjudication of claims under treaties with foreign nations," the representation of the United States in special litigation," the institution of proceedings for the condemnation of property used in insurrection," the determination of questions of law with respect to compensation of soldiers," the approval of claims against the United States," the defense of officers or agents of the United States," the attendance

<sup>87</sup> Cong. Globe, XLII, 544-545.

<sup>88</sup> 1 Stat. 523, June 30, 1797; Am. St. Papers, Misc., I, 307.

<sup>89</sup> 4 Stat. 414, Sec. 10, May 29, 1830.

<sup>90</sup> 5 Stat. 468, Sept. 11, 1841.

<sup>91</sup> 2 Stat. 229, Sec. 9, Mar. 3, 1803 (southern lands); 3 Stat. 116, Sec. 2, Mar. 31, 1814 (Miss. Terr.); 3 Stat. 691, Sec. 7, May 7, 1822; 9 Stat. 110, June 26, 1846 (Spanish La.); 10 Stat. 76, Sec. 12, Aug. 31, 1852 (Cal.); 12 Stat. 125, Sec. 2, Jan. 26, 1861, 14 Stat. 61, June 12, 1866 (fortifications); *id.*, 489, Sec. 2, Mar. 2, 1867 (Navy Dept.); *id.*, 563, Jan. 22, 1867 (N. Y. City); 15 Stat. 7, Mar. 28, 1867 (fortification, N. Y.); *id.*, 29, Mar. 30, 1867 (Navy Dept.); 16 Stat. 149, June 11, 1870 (Hot Springs Reservation, Ark.).

<sup>92</sup> 9 Stat. 80, Aug. 8, 1846.

<sup>93</sup> 11 Stat. 382, Feb. 9, 1859, boundary dispute between Massachusetts and Rhode Island.

<sup>94</sup> 12 Stat. 319, Sec. 3, Aug. 6, 1861.

<sup>95</sup> 13 Stat. 126, Sec. 4, June 15, 1864.

<sup>96</sup> 14 Stat. 14, Sec. 12, April 7, 1866.

<sup>97</sup> 15 Stat. 243, July 27, 1868.



upon the Court of Claims on behalf of the United States," the approval of compromise under revenue laws," and the institution of suits to secure completion of the Pacific railroads."

Also, from time to time, the Attorneys General were called upon to perform executive or administrative tasks more or less related to the office," such as the grant of patents," membership on the Sinking Fund Commission," the settlement of claims where the officers of the Treasury could not agree," supervisory functions with respect to coinage" and the compilation and publication of laws," the taking of the census," the keeping of archives of California for the Spanish and Mexican period," and the recommendation of measures for the security of Indian funds held in trust by the United States."

Some of these duties carried with them extra compensation for the Attorneys General," but the major supplement to their regular salary was still expected to come from private practice. Indeed, it was in their private professional capacity that the Attorneys General argued many major constitutional cases. *Dartmouth College v. Woodward*, *Gibbons v. Ogden*, *Cohens v. Virginia*, *Brown v. Maryland*, *Luther v. Borden*, and *Baron v. Baltimore* were not government cases. Neither was *Chisholm v. Georgia*, which drew from Edmund Randolph his most brilliant Supreme Court argument.

The propriety of private practice had been discussed when the law department bills of 1830 and 1846 were before Congress. One

<sup>16</sup> *Id.*, 75, Sec. 5, June 25, 1868.

<sup>17</sup> *Id.*, 58, Sec. 7, Mar. 31, 1868.

<sup>18</sup> 16 Stat. 56, Sec. 3, April 10, 1869.

<sup>19</sup> Cushing, *Office and Duties of Attorney General* (1854), 6 Op. 326, 336.

<sup>20</sup> 1 Stat. 109, April 10, 1790; *id.*, 318, Feb. 21, 1793; 5 Stat. 117, July 4, 1836; Taney to Supt. Pat. Off., July 8, 1833, Letter Bk. A, 364; Butler to Reg. Treas., Nov. 24, 1834, Letter Bk. B, 17.

<sup>21</sup> 1 Stat. 186, Aug. 12, 1790.

<sup>22</sup> *Id.*, 279, Sec. 7, May 8, 1792.

<sup>23</sup> *Id.*, 246, Sec. 18, April 2, 1792.

<sup>24</sup> 3 Stat. 129, April 18, 1814. Rush prepared the plan and the edition appeared in five volumes in 1815. *Democratic Review* (April 1840), 307. Gilpin drafted legislation in 1840. Wall to Gilpin, June 16, 1840, A. G. Ms.; Gilpin to Wall, June 20, 1840, Letter Bk. B, 96.

<sup>25</sup> 9 Stat. 402, Mar. 3, 1849.

<sup>26</sup> 11 Stat. 289, May 18, 1858.

<sup>27</sup> 14 Stat. 492, Mar. 2, 1867.

<sup>28</sup> The Attorney General's salary: \$1,500 in 1790; \$1,900 in 1791; \$2,400 in 1797; \$3,000 in 1799; \$3,500 in 1819; \$4,000 in 1830; \$4,500 in 1841; \$6,000 in 1850; \$8,000 in 1853. Wirt received \$3,450 for special legal work not included within his special duties, between 1818 and 1821, Am. St. Papers, Misc., II, 932.

of the few points on which Senators Rowan and Webster agreed in 1830 was that the "no private practice" motion of Senator Forsyth of Georgia ought to fail. Through private practice, said Senator Rowan of Kentucky, the Attorney General's "intellect would be strengthened, his mind improved, and his legal acquirements increased, so as to enable him to render more efficient and distinguished service to the Government." Webster spoke with scorn of Forsyth's suggestion, which he thought was "as reasonable as for a gentleman to tell his physician that he should not feel the pulse of any other human being."<sup>81</sup>

Cushing found a different situation in 1853. His salary equalled that of the other cabinet officers. This fact led him to believe that Congress, in granting the increase, had intended to repeal "by implication, the previous implication of law" which permitted private practice. His decision, so wisely and promptly reached, gave the English-speaking world its first full-time Attorney General.<sup>82</sup>

From 1818 to 1850 the Attorney General was provided only one official clerk at a small salary. William Wirt offered the position to an old schoolmate, but from the clerk's salary he deducted sums for stationery, fuel, and messenger service. Not until 1831 did Congress provide a salary for the messenger. Moreover, Congress regularly discriminated between the Attorney General's clerk and messenger and those of corresponding officers in other establishments. Wirt and Butler both protested, the latter insisting that his clerk to be efficient must be a lawyer capable of examining patents and performing other legal duties.<sup>83</sup>

Butler's clerk, Richard Key Watts, whom Taney had appointed, also made legal abstracts for the use of the Attorney General; and Watt's successor, John T. Reid, who served fourteen years beginning in 1841, aided the Attorneys General efficiently in compiling the material for their opinions. When the House of Representatives requested the transmission of copies of all the available opinions

<sup>81</sup> Register of Debates, VI, Pt. 1, 323, 324; Cong. Globe, XV, 1134.

<sup>82</sup> Cushing, *op. cit.*, 354.

<sup>83</sup> Wirt to Wallace, July 6, 1825, Wirt Papers, Lib. Cong., II; 4 Stat. 452, 457, Mar. 2, 1831; Butler to Nourse, Nov. 24, 1834, Letter Bk. B, 17; Butler to Cambreling, Feb. 3, 1836 and Nov. 28, 1837, *id.*, 40, 64-65.

since 1789, Attorney General Gilpin pressed both the clerk and the messenger into this service."<sup>44</sup>

At last, in 1850, Congress granted an additional clerk, to whom office usage attached the title "chief clerk." For the \$2,000 salary Attorney General Crittenden succeeded in securing the services of George M. Bibb, a man in his seventy-fourth year, a typical gentleman of the old school who went about his duties in the knee breeches of an earlier generation. Bibb, chief clerk, had been a judge and twice chief justice in Kentucky, twice a United States Senator, Secretary of the Treasury under John Tyler, and thereafter had practiced law in the District of Columbia. He toiled eighteen hours a day, and his family aided by copying manuscripts."<sup>45</sup>

Even then Cushing found the work far behind when he took office in 1853. None of Crittenden's correspondence or opinions had been recorded. Current business, the preparation of opinions and briefs, was all Bibb and Reid could handle. Cushing secured President Pierce's consent to add three temporary clerks pending congressional action. Even with this assistance, some of the records were not kept and public business was delayed. The additional duties which Cushing assumed did not help matters. Congress finally allowed four permanent clerks."<sup>46</sup>

Archibald Roane of Texas, who sought and obtained a clerkship at this time, was to play quite unintentionally an important part years later in keeping Cushing from the Chief Justiceship of the United States. Roane, who was a relative of former President Tyler, joined the staff in 1854 and remained until 1861, when he, being a secessionist, resigned and went South. With him he carried a letter of introduction from Cushing to his old cabinet colleague, Jefferson Davis, President of the Confederate States, strongly praising Roane's talents as a practical man and "a ripe and accomplished scholar, with predominating literary tastes and habits." This

<sup>44</sup> Butler to Johnson, April 2, 1836, *id.*, 68; Office Regulations, July 28, 1840, A. G. Ms.

<sup>45</sup> 9 Stat. 532, Sept. 30, 1850; Dict. Am. Biog., II, 235; Bibb to Cushing, June 6, 1854, A. G. Ms.

<sup>46</sup> Cushing to Pierce, April 15, 1853, A. G. Ms.; Cushing to Houston, June 6, 1854, *ibid.*; Bibb to Cushing, June 6, 1854, *ibid.*; Act of Aug. 4, 1854, 10 Stat. 572; Cong. Globe, XXX, 70.

letter or a forged version, exhibited in the controversy over the confirmation of Cushing as Chief Justice in 1874, helped to prove to a rebel-hating Reconstruction Senate that Cushing was not fit for high judicial preference."

Clerk Reid engaged extensively in private professional work. But chief clerk Bibb, in deciding to accept large fees to represent California land claims against the United States, felt that continuance in office, though perfectly legal, would be indelicate, and he resigned. As Bibb's successor Cushing chose Ransom Hooker Gillet, who had served Polk as Register and later as Solicitor of the Treasury. Gillet's ability as a lawyer and as an administrator had been demonstrated. His acquaintance with the machinery of law enforcement had enabled him to make numerous proposals for reform in the general body of statutes, the law of public office, and the fee system."

These were boom years for the Attorney General's office. The regular staff proved wholly unequal to the transaction of the vast amount of California litigation which poured in, and a considerable temporary staff was employed. Following the defeat of the last law department proposal, Jeremiah S. Black, Cushing's successor, turned his attention to the more efficient organization of his office. For seven years, able lawyers had occupied the chief clerkship; but early in 1858 Gillet resigned because he found his duties too heavy to permit him to supplement the small salary by private practice as he had planned. This left Black, as he said, with more clerks than the office needed and no professional force at all. At \$2,000 he found it impossible to replace Gillet."

The Attorney General therefore turned to Congress, where he enlisted the cooperation of Senator Bayard, Chairman of the Judiciary Committee, who introduced on May 17, 1858, an amendment

"Meehan to Cushing, Aug. 19, 1854, Cushing Papers, Lib. Cong. (1854); Roane to Cushing, Sept. 15, 1854, *ibid.*; Bates Diary, *op. cit.*, 181; Fuess, *Life of Caleb Cushing* (1923), II, 370-372.

"McMaster to Reid, May 6, 1851, A. G. Ms.; Bibb to Cushing, Jan. 16, 1855, Cushing Papers, Lib. Cong. (1855); Cushing to Gillet and Gillet to Cushing, Jan. 31, 1855, *ibid.*; Dict. Am. Biog., VII, 289; Report of Sol. Treas. (1849), Sen. Ex. Doc., IV, No. 36, 30 Cong. 2 Sess.

"Cong. Globe, XXXVI, Pt. 3, 2185; Black to Phelps, Dec. 18, 1858, Letter Bk. B-2, 68.

to the legislative appropriation bill designed to substitute for the six clerks two \$1,600 clerks and two "assistant counsel" at \$3,000 each. "There is a very small portion of mere clerical duty to be performed in that office," said Senator Green of Missouri, "but there is a class of duties to which a mere clerk is perfectly incompetent, and that is the preparation of briefs, the hunting up of law, the arrangement of cases, and the preparing of opinions."

Opponents of the measure charged that two Assistant Attorneys General were in fact being created. They condemned the tendency to create such offices and shift responsibility. Furthermore, said Senator Collamer of Vermont, an assistant to the head of a department ought to be chosen by the President, not the department head. Virginia's R. M. T. Hunter thought the condition of the Attorney General's office but one manifestation of the need existing throughout the whole government for a sound personnel system. Get better clerks and reward competence by promotion. The committee's proposal seemed to him a patronage measure, dangerous as a precedent because other offices could so easily make similar requests. Bayard and Green answered the arguments as best they could, but the Senate was not to be convinced and the amendment went down to defeat.<sup>70</sup>

At the next session Black proposed to reduce his total payroll, if Congress would give him one clerk at \$3,000. "To make the office effective really requires two assistants, but that having been refused by Congress at its last session, I shall not press it again." This time the proposal passed. The new officer was called an "assistant" and not an "assistant counsel" as before. To the new assistantship Black appointed Alfred B. McCalmont. He signed himself officially as "assistant" but was popularly referred to as "Assistant Attorney General"; and this title received at least tacit recognition in the appropriation bill of 1860 over strong protest that the assistantship left Attorney General Black leisure to engage in politics.<sup>71</sup>

Many decades had passed since the justices of New Hampshire

<sup>70</sup> Cong. Globe, XXXVI, Pt. 3, 2183-2185.

<sup>71</sup> Black to Phelps, Dec. 18, 1858, Letter Bk. B-2, 66; Cong. Globe, XLIX, 1208, 1569-1570; 11 Stat. 420, Mar. 3, 1859; Cong. Globe, 36 Cong. 1 Sess., LII, Pt. 3, 2262-2263; 12 Stat. 91, 101, June 23, 1860.

refused to listen to arguments upon "quirks of Coke and Blackstone." The state and federal courts had developed a body of decisions of their own and the Attorney General had frequent occasion to consult books of foreign and international law. Although in 1818 Congress had ignored Wirt's recommendation that his hard-won quarters be furnished in part with state statutes, Berrien had succeeded in 1831 in getting \$500 for books to supplement his private library and the collections to which he and his predecessors had access in the libraries of Congress and the State Department. At long intervals a reluctant Congress granted further funds, and gradually the Attorney General's office was supplied with the tools of the lawyer's trade."

Despite offices, books, clerks, and an assistant—a very modest law office even in that day—it was essentially a one-man establishment. The whole responsibility for both policy and detail was calculated to rest upon the Attorney General. Curiously enough the last law department bill had failed because a former Attorney General, Senator Crittenden, thought the occupant of the Attorney General's chair could not assume further "laborious and important duties."

Randolph had written, "I do more with my own hands than one of the departments with its clerks." Wirt had found the office "no sinecure." When Taney resigned, Judge Daniel refused the office because "with the duties of a cabinet minister, with the liability of being called on for instructions by every bureau, with the necessity of encountering not one or two, but every one in succession of the ablest counsel in the nation, each separately and deliberately prepared on every varied department of jurisprudence foreign and domestic, the office of the Attorney General is decidedly the most onerous in the government." Yet new duties accrued and, as the *New York Tribune* and *Harper's Weekly* remarked of Black, "though you

<sup>78</sup> Wirt to Nelson, Mar. 27, 1818, Letter Bk. A-2, 21; Act of Mar. 2, 1831, 4 Stat. 457; Butler to Nourse, Nov. 24, 1834, Letter Bk. B, 17-18; Register of Debates, XI, Pt. 1, 1020-1021, 1125; Letters exchanged between Dent and Gilpin, Dec. 7, 1840, A. G. Ms. and Letter Bk. B, 121; Act of May 8, 1840, 5 Stat. 377; Gilpin to book dealers in Philadelphia and New York, 1840, Letter Bk. B, 107, 108; Legaré to Beasley, Oct. 31, 1842, Letter Bk. A-2, 548; Acts of Aug. 4, 1854, 10 Stat. 546, 558, and Mar. 3, 1855, *id.*, 643, 656.

never meet the Attorney General at a ball or a *soirée*, you can find him all day in the Supreme Court, and nearly all night at his office." " It was left for the aftermath of civil war to resolve the question of a department of law.

<sup>78</sup> Kennedy, *op. cit.*, II, 67; Conway, *op. cit.*, 133; Swisher, *op. cit.*, 144; Brigrance, *Jeremiah Sullivan Black* (1934), 46-47.

## CHAPTER IX

### A HOUSE DIVIDED

"A HOUSE divided against itself cannot stand," senatorial nominee Abraham Lincoln warned the Illinois Republican Convention in 1858. "I do not expect the house to fall—but I do expect it will cease to be divided."<sup>1</sup> To his contemporaries, these were threatening words. To a well-informed citizen in 1787, however, they would have seemed only a strong expression of faith that the current movement against slavery would continue. In Massachusetts the supreme judicial court had interpreted the state bill of rights as abolishing slavery. Other New England states, together with New York, Pennsylvania, Delaware, Maryland, and Virginia, forbade the future importation of slaves. North Carolina put a tax on importation. The northerly group of states declared all persons thereafter born into slavery to be free, and New Jersey, Delaware, Maryland, and Virginia removed all obstacles to emancipation. Only South Carolina and Georgia held back. This trend projected itself into the national domain when the Continental Congress prohibited slavery in the Northwest Territory.<sup>2</sup>

The Constitutional Convention, though predominantly composed of men unfriendly either to slavery or to the slave trade, was obliged to make two important concessions. In order to insure the adoption of the commerce clause, the Convention placated the far South by pledging that the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight." Secondly, the fugitive slave clause was unanimously adopted. "No Person held to Service or Labour in one State,

<sup>1</sup> Nicolay and Hay, *Abraham Lincoln* (1890), II, 136-137.

<sup>2</sup> Fiske, *Critical Period of American History* (1899), 72-76; Ordinance of 1787, Art. VI, MacDonald, *Select Documents Illustrative of the History of the United States* (1909), 28.



under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." <sup>3</sup> These provisions determined the course of two of the principal problems of slavery, the control of importation and the surrender of interstate runaways.

The Congress of the new nation moved to put its stamp of disapproval on the slave trade. In 1794 the construction or equipment of vessels in the United States for use in the trade was forbidden. Fines were imposed for receiving or transporting Negroes in such trade. In 1800, citizens of the United States were forbidden to own or serve vessels engaged in the foreign slave trade. In 1803, Congress protected states which prohibited the importation of Negroes, by imposing fines and directing the officers of the revenue "vigilantly to carry into effect" the state laws "conformably to the provisions of this act." The measure opened the way for prosecutions by the federal authorities throughout most of the United States.<sup>4</sup>

These laws first presented a problem to the Attorney General in 1801 when the schooner *Sally* of Norfolk anchored from stress of weather at Nottingham in the Patuxent River on the Chesapeake. She had been on a voyage from Charleston to the Cape Verde Islands on the highroad to Africa and carried the paraphernalia ordinarily found on slavers. "The handcuffs and bolts are palpable testimonials of the intention of the voyage, and the concealment of them and their omission in the statement of the cargo, strengthens the proof," Jefferson decided after taking the opinions of Gallatin and Lincoln regarding the wisdom of seizure. "The traffic, too, is so odious that no indulgences can be claimed." Orders went out to the Comptroller of the Treasury to have the district attorney proceed against the vessel under the acts of 1794 and 1800. However, the vessel and her cargo were freed after trial.<sup>5</sup>

When the constitutional limitation against interference with the importation of slaves expired in 1808, an anticipatory act passed

<sup>3</sup> Constitution, Art. I, Sec. 9; *id.*, Art. IV, Sec. 2.

<sup>4</sup> 1 Stat. 347, Mar. 22, 1794; 2 Stat. 70, May 10, 1800; 2 Stat. 205, Feb. 28, 1803.

<sup>5</sup> Jefferson to Gallatin, Nov. 28, 1801, Ford, *op. cit.*, VIII, 106; Gallatin to the Comptroller, Nov. 30, 1801, Am. St. Papers, Commerce & Navigation, I, 727; *The Schooner Sally*, 2 Cranch 406 (1805).

during the preceding session of Congress became operative. Not only did it proscribe the slave trade altogether but it provided heavy penalties and drastic means of enforcement. The President was authorized to use the armed vessels of the United States to search for and arrest slave smugglers along the coast and on the high seas. The disposition of smuggled Negroes, when seized in federal legal proceedings, was a matter of contention. Some Representatives and Senators wished them to be freed. Others thought they should be sold by the United States. They compromised by turning the unfortunates over to the states into which they were brought. Ten years later the statute was extended to penalize buyers, sellers, and owners of slaves brought into the country in violation of the act. Ignorance of the fact that a slave had been illegally imported was to be no defense, and the burden of proof was put upon the defendants in all cases arising under the statute.\*

While the United States strengthened its legislation, Great Britain was leading a drive to stamp out the slave trade through international cooperation. England and Portugal agreed to allow the naval vessels of each to search the ships of the other suspected of being slavers. When President Monroe's cabinet took up the question whether the United States should become a party to this agreement, the proposal was rejected on several grounds, particularly the American objection to the right of visit and search.<sup>7</sup> Attorney General Wirt and Secretary of State John Quincy Adams disagreed sharply over the international tribunals provided to enforce the national laws against slavers of each country. "Mr. Wirt thought there was no constitutional authority in the Government of the United States to establish a Court, partly consisting of foreigners, to sit without the bounds of the United States, and not amenable to impeachment for corruption, and he cited the Constitution, Article 3, Section 1," wrote Adams. "But, as the power of making treaties is without limitation in the Constitution, and treaties are declared to be the supreme law

\* 2 Stat. 426, Mar. 2, 1807; 3 Stat. 450, April 20, 1818.

<sup>7</sup> Monroe later conceded a point to the British doctrine of right of search when he approved Wirt's suggestion that it would be proper for American public vessels to demand to see a ship's papers to show that the flag under which it claimed protection was not fraudulently assumed. Monroe to Brent, Sept. 24, 1821, Hamilton, *Monroe's Writings* (1902), VI, 202.

of the land, I still hold to the opinion that there is no constitutional difficulty in the way." \*

Two more acts were soon added to the growing list of federal statutes. The first, in 1819, empowered the President to send naval vessels to African waters to aid in the suppression of the trade. Monroe notified Congress that he hoped this measure, together with those of other nations, would soon terminate "a commerce so disgraceful to the civilized world." The second, passed the next year, declared it piracy to participate as an officer or member of the crew of a slaver. Yet, drastic as it was, this legislation could not halt the remunerative traffic. Ever since the invention of the cotton gin with its consequent expansion of the cotton market, slavery had been increasingly profitable in America. Where cotton was king cheap labor was necessary, and the huge sums to be made in the trade outran its risks. "It cannot be concealed," said Justice Story in 1822, "however humiliating the fact may be, that American citizens are, and have been, long engaged in the African slave trade, and that much of its present malignity is owing to the new stimulus administered at their hands." \*

Much of the responsibility for the enforcement of the laws against the slave trade rested upon the collectors of the customs, through whose offices vessels entered and cleared. Attorney General Wirt explained their duties,<sup>10</sup> and early in his long term of office the slave trade cases began to find their way up from the lower courts. The line began with the Spanish brig *Josefa Segunda*, seized on the Mississippi. It was asserted that the vessel had put into American waters as a result of necessity. Justice Livingston commented upon the "impenetrable obscurity" of the evidence supporting this claim. "If, on testimony so vague, so contradictory, and affording so little satisfaction, this court should award restitution, all the acts of congress which have been passed to prohibit the importation of slaves into the United States, may as well be expunged from the statute book; and this inhuman traffic, for the abolition of which the United States

\* *J. Q. Adams' Memoirs* (1875), Oct. 30, 1818, IV, 151.

\* 3 Stat. 532, Mar. 3, 1819; *id.*, 600, May 15, 1820; Message of Dec. 7, 1819, Richardson, *op. cit.*, II, 54, 62; *La Jeune Eugenie*, Fed. Cas. 15,551 (1822).

<sup>10</sup> Wirt to Crawford, Oct. 8, 1819, 1 Op. 312-314, and May 19, 1820, 5 Op. 724, 725.

have manifested an early and honorable anxiety, might, under the most frivolous pretexts, be carried on, not only with impunity, but with a profit which would keep in constant excitement the cupidity of those who think it no crime to engage in this unrighteous commerce." The *Josefa Segunda* was ordered forfeited.<sup>11</sup>

This conclusion did not rescue the slaves from their servitude. In accordance with the provisions of the act of 1807 and a Louisiana statute, they had been delivered to the sheriff for sale. Who should receive the money derived from the sale? The question was hotly disputed among Roberts, the revenue inspector who had first boarded the vessel, Gardner, the customs officer who took it over from him, Meade and Humphrey, military officers who succeeded Gardner in control and placed a guard on board besides anchoring the vessel within the protection of Fort St. Philip, and Benjamin Chew, collector of the customs, who took the vessel from the military officers and actually prosecuted the case. The lower court dismissed all the claims save that of Collector Chew, and the *Josefa Segunda* made a second appearance in the Supreme Court. The Attorney General represented both the United States and Chew against the other claimants. The Court concluded that none of the private claimants had any right to the proceeds.<sup>12</sup>

The United States, however, was not to enjoy the profits anticipated from this decision. When the case returned to the lower court for disposition, Attorney General Preston of Louisiana interposed a claim on behalf of the state. When for the third time the *Josefa Segunda* came before the Supreme Court, a novel situation was revealed. The vessel had been merely lying in American waters and was not actually importing slaves when taken; hence, said the Court, the sale of the Negroes had been unauthorized by law and the United States was not entitled to the proceeds. Whatever claim Louisiana had was cut off by the act of 1819, which, in the so-called colonization provision, conferred custody of Negroes upon the President. Here then were the proceeds of an unauthorized sale to which no member of a once considerable group of claimants had any right.

<sup>11</sup> *The Josefa Segunda*, 5 Wheat. 338 (1820).

<sup>12</sup> Chew to Wirt, Nov. 18, 1824, Chew to Wirt, Dec. 26, 1824, and Jan. 18, 1825, A. G. Ms.; *The Josefa Segunda*, 10 Wheat. 312, 326-327, 332 (1825).

"We would not be understood to intimate, that the United States are entitled to this money," said the Court, "for they had no power to sell; nor do we feel ourselves bound to remove the difficulties which grow out of this state of things." <sup>13</sup>

Four years after the first appearance of the *Josefa Segunda* in the Supreme Court, a veritable avalanche of slave trade cases confronted Wirt. From South Carolina came the case of the *Emily* and the *Caroline*, ships charged with fitting out in Charleston. "To apply the construction contended for on the part of the claimant, that the fitting or preparation must be complete, and the vessel ready for sea, before she can be seized," Justice Johnson ruled for the Court, "would be rendering the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner." Wirt was similarly successful in the *St. Jago de Cuba*, a vessel transferred to the notorious slaver Maher, sent to Cuba in charge of the equally notorious Strike, and fictitiously sold there to attain Spanish registry. <sup>14</sup>

Three American vessels, the *Constitution*, the *Merino*, and the *Louisa*, in spite of the fact that American vessels were forbidden to carry slaves from foreign port to foreign port, took on cargoes in Cuba to be delivered at Pensacola, Florida. When the ships reached the supposed Spanish possession they found General Andrew Jackson there to discipline the Seminoles and extend the authority of the United States. The *Merino* and the *Louisa* learned of the American occupation from a United States vessel well named the *Surprise*. The *Constitution*, however, received no such news and sailed boldly under the guns of what she supposed to be a Spanish fort, to be boarded and seized by Colonel Brooke of the United States army. When the others were taken, all three vessels were sent to Mobile for adjudication.

"Since the condition of persons who are already slaves, cannot be changed or made worse, by their removal from one slave-holding country to another," argued the defense in the Supreme Court, "the statutes ought not to be so construed as to prohibit citizens of the

<sup>13</sup> *U. S. v. Preston*, 3 Pet. 57, 67 (1830).

<sup>14</sup> *The Emily and The Caroline*, 9 Wheat. 381, 388 (1824); *The St. Jago de Cuba*, *id.*, 409 (1824).

United States from being concerned in such removals." To this Wirt replied for the United States, and the Justices sustained his reasoning. "The court do not feel themselves justified in restraining the general expression of this law," said Justice Washington, "upon the ground of a supposed policy, the reality of which, to say the most of it, is very questionable."<sup>14</sup>

At the next term, the human cargo of the *Antelope* was claimed by Spanish and Portuguese consuls, as well as by the United States. "The case is one of human liberty," said Wirt. "The Africans stand before the court, as if brought up before it upon a *habeas corpus*. Suppose them here, on such a process, asserting their freedom, and claiming your protection; what kind of proof would you exact from those who claim to hold them in slavery? Most certainly, you would not demand inferior evidence to that which you require in a case of life or death. The witnesses must present themselves fairly before you. Their statement must be clear and consistent, and such as to command the confidence of the court. They must be sustained by the documentary evidence; and, where any doubt is left, the decision should be *in favorem libertatis*."

It was, Chief Justice Marshall said in deciding for the Spanish, one of those cases "in which the sacred rights of liberty and of property come in conflict." Christian nations had long been engaged in the trade. "However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned, in modern times, by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business, which no other could rightfully interrupt." A trade so recently authorized and protected by the laws of all commercial countries could not be considered contrary to the law of nations. "Slavery," he admitted, "has its origin in force; but as the world has agreed, that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful."<sup>15</sup>

In the case of the *Plattsburgh*, false registration was disclosed.

<sup>14</sup> *The Merino, The Constitution, and The Louisa*, 9 Wheat. 391 (1824).

<sup>15</sup> *The Antelope*, 10 Wheat. 66 (1825); Wirt to Southard, Dec. 30, 1823, 1 Op. 635.

"It is a trade, odious in our country, and carries a permanent stain upon the reputation of all who are concerned in it, and is watched by the severest vigilance of the government," said Justice Story. "If carried on at all, it must, therefore, be carried on by Americans, under the disguise of foreign flags; and it is notorious, that in the colonial ports of Spain, there is little difficulty in procuring all the apparatus for the use of the national flag."<sup>17</sup>

Attorney General Wirt had no soft spot in his heart for slave traders. In one much delayed case referred to him for opinion, he found an Indian agent guilty of aiding in a breach of the law "*and THIS from mercenary motives.*"<sup>18</sup> A petition signed by many Baltimoreans for the release of Captain Smith of the *Plattsburgh* was referred to him by the President. "Men readily yield their names in support of an application for mercy, for the sound exercise of which they are not to be responsible," Wirt advised Monroe, "but reflecting men know that in a country in which there exists no authority to preserve the order and purity of society, save that of the laws, the laws should be vigilantly and strictly enforced, or they lose all their efficacy, and the social compact is dissolved." Efforts were renewed to secure the pardon. "Wirt remarked upon it," noted Adams, "that from these insidious attempts to worm out pardons from the Executive, he doubted whether the President ought ever to issue a pardon from *ex parte* representations."<sup>19</sup>

When the American Society for the Colonization of Free Negroes sought to convince the administration that the President's statutory powers of custody and removal of Negroes seized in the slave trade enabled the United States to join in a scheme to establish an African colony, Wirt and Secretary Adams opposed this view. "To derive powers competent to this from the Slave-Trade Act was an Indian cosmogony," said Adams, "it was mounting the world upon an elephant, and the elephant upon a tortoise, with nothing for the tortoise to stand upon." All that the act empowered the

<sup>17</sup> *The Plattsburgh*, 10 Wheat. 133 (1825).

<sup>18</sup> Wirt to Monroe, Jan. 20, 1821, Sen. Doc., II, No. 93, 17 Cong. 1 Sess., 52-53.

<sup>19</sup> Wirt to Monroe, April 25, 1821, A. G. Op. (Gilpin ed.), *op. cit.*, 344; Wirt to Monroe, Nov. 7, 1821, *id.*, 381; J. Q. Adams' *Memoirs* (1875), Nov. 15, 1821, V, 398.

President to do, Wirt thought, was to protect Negroes imported contrary to law and to send them out of the country; the act did not contemplate removing emancipated slaves or free-born Negroes, or incurring expense in Africa. Secretary Crawford, who was vice president of the society, believed otherwise, the Attorney General became convinced, and Monroe decided to spend a considerable sum on the African venture. Though he disagreed as to its propriety, Adams continued this policy when he became President because he did not feel at liberty to reverse a decision of his predecessor, tacitly supported by Congress. Jackson's administration changed the policy when Attorney General Berrien, counsel for the Spanish in the *Antelope* case, ruled emphatically that there was no authority for the maintenance of the Negroes in Africa. This position Legaré in 1842 regretfully found to be well settled. The society must seek its aid from Congress."<sup>30</sup>

In addition to vexing questions regarding the ingress of personal Negro servants, free or otherwise,<sup>31</sup> the South Carolina Negro Seamen Acts, which proved obnoxious to both domestic and foreign shipping interests, called for attention. These state statutes provided that Negro employees on any vessels coming into a port of the state should be seized and imprisoned during the ship's stay and that the captain should be liable for the cost of detention. When Great Britain made a diplomatic objection early in 1824, President Monroe directed Adams to secure Wirt's opinion. The Attorney General answered that the Seamen's Acts violated both the Constitution and the treaties. By the Constitution, the power of regulating commerce with foreign nations rested exclusively with Congress, and treaties were a part of the supreme law of the land. The practices prohibited by the state acts were allowable both under the regulations made by

<sup>30</sup> 3 Stat. 532, Sec. 2, Mar. 3, 1819; *J. Q. Adams' Memoirs*, Mar. 12, 1819, IV, 294, 476; VIII, 309; Wirt to Homans, Oct. 14, 1819, 1 Op. 314; Wirt to Homans, Oct. 16, 1819, *id.*, 317; Berrien to Branch, Sept. 21, 1829, 2 Op. 272; Legaré to Tyler, Dec. 24, 1842, 4 Op. 139.

<sup>31</sup> Wirt to Sec. Crawford, Nov.-Dec. 1819, A. G. Op. (Gilpin ed.), *op. cit.*, 234-235; Wirt to Crawford, Sept. 8, 1819, 5 Op. 717; Wirt to Monroe, Nov. 3, 1821, 1 Op. 503-504; Wirt to Crawford, Aug. 22, 1821, 5 Op. 736-737; *U. S. v. The Ship Gavonne*, and *U. S. v. The Ship Fortune*, 11 Pet. 73 (1837); Taney to Dist. Atty., La., Dec. 20, 1831, 2 Op. 479-480.



Congress under the commerce power and under treaties with various nations, including Great Britain."

Six years later Attorney General Berrien disagreed. He believed the South Carolina statutes a valid exercise of the police power of the states. The South Carolina acts should be respected unless they conflicted with rights under the commercial laws or treaties of the United States. Under the convention with Great Britain, again the protesting nation, the commercial privileges granted were to be "subject always to the laws and statutes of the two countries respectively." In the first place, this should be construed to include state laws as well as federal; in the second place, the federal act of 1803, prohibiting the importation of Negroes into states which outlawed importation, recognized the authority of states to pass such laws."

It fell to Attorney General Taney to determine the issue anew. After rephrasing Berrien's arguments, he went on to elaborate his constitutional theory. The right of a slave-holding state to guard itself from the danger apprehended from the introduction of free Negroes was reserved to the states and could not be abrogated by legislation or treaty. A treaty conflicting with reserved state rights would be void. While he believed it highly probable that the Supreme Court would declare the South Carolina act null and void if contrary to the treaty, he was not prepared to admit that a judicial construction of the Constitution was forever binding upon the states and the legislative and executive branches of the federal government. For this reason he did not advise the executive to adopt in advance the construction he thought the Court would give. Whatever might be the course of the executive after decision by the Court, the law should now be regarded as valid and binding upon the vessels of Great Britain.

"The African race in the United States even when free, are everywhere a degraded class—and exercise no political influence," Taney maintained. "The privileges they are allowed to enjoy, are

<sup>22</sup> Acts of Dec. 21, 1822, and Dec. 20, 1823, S. C. Acts of Assembly, 1818-1823, 409, 544. The first statute was held unconstitutional by the federal circuit court for South Carolina in 1823. *Ex parte Elkiron v. Delierselme*, Fed. Cas. 4,366; Adams to Wirt, April 21, 1824, A. G. Ms.; Wirt to Adams, May 8, 1824, 1 Op. 659.

<sup>23</sup> Berrien to Jackson, Mar. 25, 1831, 2 Op. 426.

accorded to them as a matter of kindness & benevolence rather than of right. They are the only class of persons who can be held as mere property—as slaves. And where they are nominally admitted by law to the privileges of citizenship, they have no effectual power to defend them, & are permitted to be citizens by the sufferance of the white population & hold whatever rights they enjoy at their mercy. They were never regarded as a constituent portion of the sovereignty of any state. But as a separate and degraded people to whom the sovereignty of each state might accord or withhold such privileges as they deemed proper. They were not looked upon as citizens by the contracting parties who formed the constitution. They were evidently not supposed to be included by the term citizens. And have not been intended to be embraced in any of the provisions of that constitution but those which point to them in terms not to be mistaken.”<sup>84</sup>

In 1839, there arose the most unusual of all the many slaver cases to reach the Supreme Court, *The Amistad*. This Spanish schooner sailed from Havana for another port in Cuba. Her cargo of slaves revolted, killed the captain, and compelled Ruiz and Montez, two Spaniards aboard, to pledge to steer for Africa. Violating their word, the Spaniards set their course for the American shore where the schooner was seized near Long Island by the United States brig *Washington*. The vessel was brought into the district of Connecticut. Among the libels filed against it were those of Ruiz and Montez, who claimed the Negroes as their slaves. After Attorney General Grundy had advised turning the Negroes and ship over to the Spanish authorities for adjudication, the United States filed an information representing that the Spanish government had presented a claim, under a treaty between the United States and Spain, for the restoration of the vessel, its cargo, and the slaves as property of Spanish subjects.<sup>85</sup>

<sup>84</sup> Taney to Livingston, May 28, 1832, A. G. Ms. A supplement is filed with Taney to Livingston, June 9, 1832, State Dept., Misc. Letters. See also Taney to Sec. State, Dec. 6, 1831, 2 Op. 475; and Swisher, *op. cit.*, 149 *et seq.*

<sup>85</sup> Grundy to Ingersoll, Nov. 5 and 12, 1839, and Grundy to Holabird and Ingersoll, Nov. 15, 1839, Letter Bk. B, 81, 83, 83-84; Grundy to Sec. State, Nov. 1839, 3 Op. 484; *The Amistad*, 15 Pet. 518 (1841).

After the trial of the case during which the Hartford hotels were "filled with abolitionists and others," the district court decided that Ruiz and Montez had not sustained their claim. The Negroes had been imported from Africa in violation of Spanish law. Accordingly they were to be returned to Africa. The decree came as a complete surprise to the government, which had already made preparations for the return of the Negroes to Cuba. The United States appealed to the circuit court on behalf of Spain. This naturally proved unpopular among abolitionists."<sup>16</sup>

Upon the resignation of Attorney General Grundy and James Buchanan's refusal of the vacant post, the responsibility for the conduct of the vexatious proceeding fell early in 1840 upon Henry D. Gilpin, the first Philadelphia lawyer to hold the attorney generalship since Richard Rush. Gilpin had been closely allied with the Jacksonians, serving as United States attorney in Philadelphia, as government director of the United States bank, and finally as Solicitor of the Treasury."<sup>17</sup>

The circuit court, contrary to Gilpin's expectations, affirmed the decision of the district court and the United States appealed again. Former President John Quincy Adams was retained as additional counsel for the Africans. After unsuccessful attempts to induce the government to dismiss its appeal, Adams began the preparation of his case. The British minister asked what assistance his government might render the Negroes if the Supreme Court should decide against them. Worrying constantly over the outcome of the case, Adams feared that he might in argument give advantage to the government by losing his composure because of his strong feelings against "the abominable conspiracy, Executive and Judicial . . . against the lives of these wretched men."<sup>18</sup>

Though he was a resident of a free state, it became the duty of

<sup>16</sup> Niles Reg., Nov. 30, 1839, LVII, 223; House Doc., IV, No. 185, 26 Cong. 1 Sess., 55, 68; Holabird to Gilpin, Feb. 3, 1840, A. G. Ms.

<sup>17</sup> Van Buren to Buchanan, Dec. 27, 1839, Buchanan to Van Buren, Dec. 28, 1839, Curtis, *Life of James Buchanan* (1883), I, 452-453. Gilpin served as Attorney General from Jan. 11, 1840 to Mar. 4, 1841. His literary activities were extensive and his private library one of the largest in America. Dict. Am. Biog., VII, 315.

<sup>18</sup> Gilpin to Holabird, Mar. 27, 1840, Letter Bk. B, 89; J. Q. Adams' *Memoirs*, X, 359-362, 372-373, 399-401.

Gilpin to present to the Supreme Court the case of the government on behalf of the slavers for the return of the Negroes to Cuba. The treaty with Spain, he urged, obligated the United States. It required the return of ships and merchandise rescued from pirates or robbers on the high seas to the true owner. Slaves were, he said, property under the law of Spain. In reply, Adams' associate, Roger Baldwin of Connecticut, argued that the Africans had never become property. They had been imported into Cuba in violation of the Spanish law, since in 1820 the King of Spain, "moved partly by motives of humanity, and partly in consideration of 400,000 *l.* sterling, paid to him by the British government," had abolished the slave trade throughout the dominions of Spain. Moreover, the Negroes had seized the ship. They were not mere cargo. "It is 'merchandise rescued from the hands of pirates and robbers on the high seas' that is to be restored. There is no provision for the return of the pirates themselves," he argued. "If these Africans were 'pirates' or sea robbers, whom our naval officers might lawfully seize, it would become our duty to detain them for punishment; and then what would become of the 'merchandize?' "

The Court admitted that if the Negroes at any time had been lawfully held as slaves their restitution would have been required by the treaty but agreed with Baldwin that this had not been shown. "There does not seem to us to be any ground for doubt, that these Negroes ought to be deemed free; and that the Spanish treaty interposes no obstacle to the just assertion of their rights," wrote Justice Story. "We may lament the dreadful acts by which they asserted their liberty, and took possession of the *Amistad*, and endeavored to regain their native country; but they cannot be deemed pirates or robbers, in the sense of the law of nations, or the treaty with Spain, or the laws of Spain itself." The Negroes were not to be returned to Africa, however, because they had not been "imported" in contravention of the Slave Trade Acts. "When the *Amistad* arrived, she was in possession of the Negroes, asserting their freedom; and in no sense could they possibly intend to import themselves here, as slaves." They remained in America.

Ruiz and Montez unsuccessfully pressed their claims upon Congress."

As the years passed the general slavery issue dwarfed these legalistic battles. The South was making an ever stronger bid for new slave land. Texas was annexed. While Nathan Clifford was Attorney General,<sup>90</sup> the Mexican War brought still more territory. In the North strong forces sought to prevent the extension of slavery. While Isaac Toucey<sup>91</sup> of Connecticut and Reverdy Johnson<sup>92</sup> of Maryland served their brief terms as Attorneys General, slavery became the dominant political question of the time.

One of the elements in this larger issue was the demand for an effective fugitive slave law. The existing statute, enacted by the Federalists, had resulted from an incident which aroused the indignation of the Pennsylvania Abolition Society, once headed by Benjamin Franklin. Three white men in that state, where anti-slavery sentiment was strong, kidnaped a free Negro in 1788 and sold him into slavery in Virginia. The kidnapers were indicted by the state but fled from justice. In the summer of 1791, Governor Mifflin of Pennsylvania, prodded by the Abolition Society, asked Governor Beverly Randolph of Virginia to extradite the fugitive white men. Randolph, on the advice of his attorney general, James Innis, replied that the extradition clause of the federal Constitution was inoperative without legislation. Mifflin recommended to President Washington that

<sup>89</sup> *The Amistad*, 15 Pet. 518 (1841); Spears, *The American Slave Trade* (1900), 192-193. Compare *The Creole*, a coastwise slaver carried into British Nassau in a revolt of the slaves. The slaves were freed by the authorities. The matter ultimately went to an arbitral tribunal which found for the American claimants. In connection with this case Attorney General Legaré furnished Lord Ashburton a statement of the American position. July 20, 1842, 4 Op. 98.

<sup>90</sup> Nathan Clifford (1803-1881), a Maine countryman, loath to leave his home and family, was appointed Attorney General (1846-1848) by President Polk. He had been a leader in New England politics, and his fame was to be achieved on the bench of the Supreme Court of the United States, to which he was appointed in 1858. Clifford, *Nathan Clifford, Democrat* (1922); Dict. Am. Biog., IV, 216.

<sup>91</sup> Toucey (1796-1869) had been state's attorney and governor of Connecticut. He served Polk as Attorney General in 1848 and 1849, and later became Secretary of the Navy under Buchanan. Nat. Cyc. Am. Biog., V, 7.

<sup>92</sup> Johnson (1796-1876), one of the conspicuous lawyers of his day, formerly a member of the Senate and a prominent Whig, was credited with being the guiding genius of the presidential campaign of 1848. His political career crowded a brief term as Attorney General (1849-1850) under Taylor, marred by an opinion allowing a claim for nearly \$200,000 interest on a principal of \$43,518.97, which stirred the country to suspicion when it appeared that Secretary of War George W. Crawford was counsel for the claimants. Dict. Am. Biog., X, 112; Steiner, *Life of Reverdy Johnson* (1914).

Congress clarify the matter. Attorney General Edmund Randolph advised the President not to intervene between the states, and in the fall of 1791 the whole correspondence was sent to Congress.\*\*

The act with which Congress responded on February 12, 1793, dealt with the problem of fugitives both from justice and from slavery. Fugitive slaves could be arrested by their owners, or the owners' agent or attorney, and brought before any federal district or circuit judge in the state or any magistrate of the county, city, or town in which the seizure was made.\*\* The Attorneys General had little contact with the enforcement of the first fugitive slave law, the only public problem of importance before 1850 being the escape of Negro slaves into Indian territory.\*\* With the intensification of the slavery controversy, however, the fugitive slave act of 1793 became a nullity in many northern states. It had relied in part on state magistrates; but Massachusetts prohibited her officers from proceeding under the law, and Pennsylvania forbade her judges to take cognizance of any fugitive slave case. The South, particularly the border states, demanded a more effective statute.

During the year ending June 1, 1850, 540 slaves escaped from Maryland, Kentucky, Virginia, and Missouri, and 470 from other states. The "underground railway" was functioning efficiently. In the crisis of 1850, one of the South's strongest points was the breakdown of the fugitive slave law, and Henry Clay's compromise of that year acknowledged the justice of the complaint. The new law met the difficulty by providing for commissioners to be appointed by the federal courts to enforce the law concurrently with the judges who appointed them. Recalcitrant marshals or their deputies were to be fined \$1,000, the money to go to the claimant; and the marshals were made liable to prosecution by the claimant on official bonds where the fugitive escaped from custody. Posses could be organized. The substantive portion of the act was similar to the old law, allowing the claimant to bring the fugitive before the judges

\*\* Am. St. Papers, Misc., I, 38-43.

\*\* 1 Stat. 302, Feb. 12, 1793. See Abridgment of Debates, I, 417; 2 Stat. 115, Mar. 3, 1801; 3 Stat. 545, Mar. 6, 1820.

\*\* Wirt to Crawford, Aug. 29, 1819, A. G. Op. (Gilpin ed.), *op. cit.*, 213; Butler to Cass, Mar. 26, 1836, Letter Bk. B, 46; Butler to Poinsett, Aug. 30, 1838, 3 Op. 370; Cushing to Pierce, Feb. 18, 1854, 6 Op. 302.

or the commissioners with or without warrant. The fugitive's testimony was barred as evidence."<sup>10</sup>

On the same day on which the bill was passed, President Fillmore sought the opinion of the Kentuckian, Attorney General Crittenden, on its constitutionality. The President was troubled with the proposed procedure for removing Negroes to the places from which they had fled, which he feared would conflict with the constitutional guarantee of the privilege of the writ of habeas corpus. Crittenden promptly replied that the act was wholly constitutional. There was nothing in the bill, he said, which suspended or was intended to suspend the privilege of the writ of habeas corpus. The measure did not mention the writ. Since it could not be suspended except in cases of rebellion and invasion, no intention to commit such a violation of the Constitution ought to be imputed to Congress upon mere constructions and implications. "It is not within the province or privilege of this great writ to loose those whom the *law* has bound," he argued. "That would be to put a writ granted by the law in opposition to the law, to make one part of the law destructive of another. This writ follows the *law* and obeys the *law*."

He felt no aversion to conclusive and summary procedure on this subject. "Congress has constituted a tribunal with exclusive jurisdiction to determine summarily, and without appeal, who are fugitives from service or labor under the 2d section of the 4th article of the constitution, and to whom such service or labor is due," he explained. "The judgment of every tribunal of exclusive jurisdiction where no appeal lies, is, of necessity, conclusive upon every other tribunal. And, therefore, the judgment of the tribunal created by this act is conclusive upon all tribunals."<sup>11</sup> The President signed the bill on the same day. It was greeted in the North with a storm of abuse. Violent partisans lost sight of the fact that the South also had made concessions in the compromise of 1850.

The new law soon disappointed its southern supporters. Senator

<sup>10</sup> Mass. Acts and Resolves, 1843-1845, c. XLIX; Pa. Laws, 1847, 207, Act. No. 159; Rhodes, *op. cit.*, I, 126, 187; Cong. Globe, XVIII, 722; XX, 398, 470; XXI, 103, 210, 228, 233-238, 246, 270-271; XXII, 79-83, 383-389, 526-536, 1590-1630; 9 Stat. 462, Sept. 18, 1850.

<sup>11</sup> 5 Op. 254.

Mason of Virginia told about a neighbor who had apprehended two of his slaves in Harrisburg, Pennsylvania, and who was able to leave with his property only after an exasperating delay of two months, having spent time in prison and been prosecuted for riot. In Boston in 1851, the Negro Shadrach was arrested as a fugitive. Massachusetts prohibited the use of her jails for confining fugitive slaves. Shadrach was locked up in the United States courtroom, guarded by a deputy marshal. Colored men broke in and freed Shadrach, who escaped to Canada. "I think it is the most noble deed done in Boston since the destruction of the tea in 1773," declared the abolitionist, Theodore Parker, in his journal. President Fillmore quickly issued a proclamation calling on "all well-disposed citizens to rally to the support of the laws," commanding all civil and military officers and all other persons in the vicinity of Boston to aid in the recapture of Shadrach, and directing the district attorney to prosecute the offenders. On the same day the Senate asked for a report.

"Nothing could be more unexpected than that such a gross violation of law, such a high-handed contempt of the authority of the United States, should be perpetrated by a band of lawless confederates at noonday in the city of Boston, and in the very temple of justice," Fillmore informed the Senate. "In a community distinguished for its love of order and respect for the laws, among a people whose sentiment is liberty and law, and not liberty without law nor above the law, such an outrage could only be the result of sudden violence, unhappily too much unprepared for to be successfully resisted." He asked that Congress modify and clarify the laws on the President's authority to call out the militia and the other armed forces, and he invited the attention of Congress to the question whether a marshal or commissioner might summon an organized military force as a *posse comitatus* without the consent of its officers. Finally, five of the mob were indicted and tried, but the cause came to an end when the jury could not agree on their guilt.\*\*

Despite violent protest, the government of the city of Boston determined to protect federal process and prisoners. Sims, another

\*\* Rhodes, *History of the United States* (1902), I, 208-210; Proclamation of Feb. 18, 1851, Richardson, *op. cit.*, V, 109-110; Cong. Globe, XXIII, 596-600; Message of Feb. 19, 1851, Richardson, *op. cit.*, V, 101-106.



fugitive, was heavily guarded and the courthouse encircled with heavy chains, while the militia stood under arms at Faneuil Hall. He was the first Negro sent back from Boston since the Revolutionary War. The city seethed and funeral bells tolled as Federal Marshal Devens, long afterward to be Attorney General of the United States, escorted Sims to the wharf.<sup>40</sup> Devens had in 1850 frankly confessed himself "opposed to *any law* on the subject of fugitive slaves." He was but one of several federal officers accused of dereliction of duty under the act.<sup>41</sup>

When three years later, in 1854, Anthony Burns, a Virginia slave, was arrested in Boston, orators thundered that he should not be sent back to slavery. There were serious riots, and federal troops were called out. Excitement prevailed at Washington. The law was successfully invoked, at a cost estimated from \$40,000 to \$100,000. Judge Hoar, also to be Attorney General of the United States years later, was reported as believing that citizens had a right to disregard the fugitive slave act if they were willing to abide the penalty. Grand jury proceedings against the oratorical "instigators in Faneuil Hall" and the leaders of one of the riots resulted in indictments after much strain, many delays, and fears of violence, only to fail when Justice Curtis quashed the proceedings. After a jury awarded damages against a deputy for ejecting a stubborn spectator at one of the stages of the Burns case, District Attorney Hallett reported it as "another demonstration of the legal fact that 'there is no United States in Massachusetts.'"<sup>42</sup>

Attorney General Cushing in July 1855 had an opportunity to find out whether there was a United States in Pennsylvania. Passmore Williamson, a white man, had led a number of Negroes on board a vessel docked at Philadelphia and had forcibly made off

<sup>40</sup> Rhodes, *op. cit.*, I, 211-213.

<sup>41</sup> Webster to Crittenden, Nov. 22, 1850, A. G. Ms.; Thomas to Fay, Nov. 18, 1850, *ibid.*; Badger to Pierce, Mar. 18, 1854, *ibid.*; Freeman to Cushing, Mar. 23, 24, 29, 1854, *ibid.*; Cushing to Freeman, Mar. 22, 1854, *ibid.*; Cushing to Graham, June 23, 1855, *ibid.*; Crittenden to Fillmore, Nov. 25, 1850, 5 Op. 272.

<sup>42</sup> Rhodes, *op. cit.*, I, 500, 505; Stevens, *Anthony Burns* (1856); Monthly Law Reporter (1855; New Series), VII, 168-177, 181-216, VIII, 76; Hallett to Pierce, May 27, 31, 1854, April 13, June 9, 1855, A. G. Ms.; Hallett to Cushing, June 22, July 8, Sept. 12, Oct. 1, Oct. 9, Nov. 25, 1854, April 13, 1855, Dec. 12, 1856, *ibid.*; Cushing to Hallett, April 19, 1855, *ibid.*; New York Times, June 9, 1854; Worcester Daily Spy, Oct. 31, 1854.

with three slaves belonging to the United States minister to Nicaragua. Imprisoned for contempt of the federal district court when he failed to obey an order for the restoration of the slaves, Williamson applied to the supreme court of Pennsylvania for release on a writ of habeas corpus. Cushing worked out a detailed strategy to meet the state court's expected action, advising as a final step that a federal judge be asked to issue a writ of habeas corpus for the marshal in the event of that officer's imprisonment for refusal to obey the state writ. "Thus the conflict of jurisdiction will be complete between the highest local judicial authorities of the United States and of the State," explained the Attorney General. Since argument on the legal rights of the United States would be possible at each stage of the controversy, there would be no need to use force to keep the marshal out of the state's hands. The question was one simply of competing jurisdictions, involving purely judicial issues. However, on September 8, 1855, the state court by a majority of four to one refused a writ to free Williamson from the federal authorities. The decision was delivered by Judge Jeremiah S. Black.<sup>44</sup>

The clash which was averted in Pennsylvania had meanwhile occurred in Wisconsin. On March 11, 1854, a crowd in Milwaukee freed a fugitive Negro held in jail by a deputy marshal. The editor of the Milwaukee *Free Democrat*, Sherman M. Booth, was arrested as one of the rescuers and, after examination by a United States commissioner, held to appear before the federal district court. The Wisconsin supreme court freed Booth on a writ of habeas corpus, holding that the writ of commitment was defective and that so much of the 1850 act as conferred judicial powers upon the commissioners and denied fugitives trial by jury was unconstitutional. A federal grand jury then found indictments against Booth and two others implicated in the rescue; but when Booth was committed by the district court in default of bail, the state supreme court refused him another writ of habeas corpus. Early in 1855, the Wisconsin supreme court finally issued a second writ of habeas corpus for

<sup>44</sup> *U. S. ex rel Wheeler v. Williamson*, 5 Pa. Law J. Rep. 365, 377 (1855); *Passmore Williamson's Case*, 26 Pa. 9, 11 (1855); *Williamson v. Lewis*, 39 Pa. 9 (1861); Webster to Wheeler, Sept. 2, 1855, A. G. Ms.; Van Dyke to Cushing, July 27, Sept. 6, Sept. 8, 1855, *ibid.*; Cushing to Wynkoop, Sept. 8, 1855, *ibid.*; Cushing to Pierce, Sept. 7, 1855, 7 Op. 482.

Booth, who meanwhile had been convicted in the federal district court on new indictments."

An open break now seemed unavoidable. The district attorney advised refusal of obedience to the state writ. The district court's sentence against Booth should be executed by force. "It is a mob spirit against which we are contending and in my judgment should be treated as such by the Government." Cushing decided to appeal to the Supreme Court of the United States. He explained that this was "in consideration of the fact that the United States have no prison of their own in Wisconsin, and of the inconvenience in other respects of entering into a mere contest of force with the authorities of the State in this matter." The conflict between the federal and state authorities was intensified when the Wisconsin supreme court ordered its clerk to ignore the writ of error from the Supreme Court of the United States. The Supreme Court finally granted a motion to docket the case without further notice to either party and argument came on at the December term, 1858. Marshal Ableman had meanwhile lost heart and resigned his office, the duties of which he said were "embarrassing and arduous." <sup>44</sup>

On January 18, 1859, Black, now Attorney General of the United States, appeared in the Supreme Court on behalf of the federal government. "The habeas corpus in the hands of a State judge may be used against the Federal tribunals as a Writ of Prohibition before judgment, and a Writ of Error after judgment," he argued. "You have *no jurisdiction* when the State judges think you exercise it erroneously. No jurisdiction! One blast upon that ram's horn and the whole structure of judicial authority built up by this Government comes tumbling about our ears like the walls of Jericho." The logic of the state judges, Black pointed out, was completely circular. "Their language to the Federal judge is substantially this: 'We admit that the validity of our judgment depends

<sup>44</sup> *In re Booth*, 3 Wis. (Smith) 1, 145 (1854); *In re Booth*, 3 Wis. 157 (1855); *Ableman v. Booth*, 21 How. 506 (1859); Sharpstein to Streeter, June 3, 1854, A. G. Ms.; Cushing to Sharpstein, June 20, 1854, *ibid.*; Sharpstein to Cushing, July 22, 1854, *ibid.*; Cushing to Streeter, Sept. 11, 1854, 6 Op. 713.  
<sup>45</sup> Sharpstein to Cushing, Feb. 21, 1855, A. G. Ms.; Cushing to Sharpstein, April 27, 1855, *ibid.*; Ableman to Buchanan, April 29, 1857, *ibid.*; Cushing to Streeter, Feb. 23, 1855, 7 Op. 51; *Ableman v. Booth*, 21 How. 506, 511-512 (1859); *In re U. S. v. Booth*, 18 How. 476, 478-479 (1856).

on yours being void, but yours is void because ours is valid; and when we pronounced our valid judgment, we said yours was void."

This power of review which the state judges sought to hold over the federal courts was claimed as a mere incident to the law of habeas corpus, which meant that a judge of the lowest state courts could subordinate the most learned of the federal judges even on questions of national law by issuing the writs. Black invited the Supreme Court of the United States to picture itself hearing arguments of counsel while among the spectators sat a probate judge of the county. "It is not worth while for the counsel to argue the case to you," he exclaimed, "let them address him; for he is the judge of last resort. You need not charge the jury. . . . Charge the judge in the corner; for if you do not convince him, he will mount his *habeas corpus* and charge down upon you. . . . One word of his will paralyze your power." <sup>44</sup>

In a decision which stands as a landmark in the constitutional history of the United States, Chief Justice Taney reversed the Wisconsin supreme court. State courts had no right to interfere by habeas corpus or other process with federal prisoners. "It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead," wrote the Chief Justice. "It is, of itself, a sufficient and conclusive answer; for no one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found." <sup>45</sup>

The decision was denounced by abolitionists. The Wisconsin legislature passed defiant resolutions. Because of public sentiment, Black waited before trying to have Booth re-imprisoned. There was difficulty in getting the state court to act on the Supreme Court mandate. When Booth was again arrested and confined in the custom house in Milwaukee, a state court commissioner attempted to free him again by a writ of habeas corpus. The federal marshal ignored

<sup>44</sup> Black, *Essays and Speeches of Jeremiah S. Black* (1886), 417-430.

<sup>45</sup> *Ableman v. Booth*, *supra*, at 515.

the writ. Booth served the remainder of his one month sentence and, unable to pay his fine and costs amounting to \$1,500, languished in jail until August 1860, when an organized band rescued him. Recaptured several months later by the federal authorities, he remained in prison while his pardon was long delayed by his stubborn refusal to address the President in his own behalf.<sup>47</sup>

Federal officers charged with the enforcement of the unpopular fugitive slave law often hesitated to brave public opposition. The Attorneys General were in some instances called upon to decide whether the government should assist these officers in defending themselves in the performance of duty. Crittenden was inclined to let them stand on their own legs, but Cushing in several cases gave legal and financial assistance. However, when the marshal at Boston before serving process for the arrest of an alleged fugitive slave went so far as to demand that the owner protect him with a bond of indemnity in case the arrest should be wrongful, Cushing balked.<sup>48</sup>

In the last years of the 1850's, President Buchanan's administration was making some effort to enforce the laws against the importation of slaves. But the difficulties of enforcement, even in cases of clear violation, were overwhelming. In one case it appeared that the yacht *Wanderer* entered the port of Brunswick, Georgia, in December 1858, on suspicious clearances from Charleston and Trinidad. After investigating a rumor that the *Wanderer* had landed a large number of slaves nearby before entering Brunswick, the collector and the district attorney felt warranted in seizing the ship, whose crew had deserted. The matter quickly won the attention of the Buchanan administration when it appeared that a large-scale system of slave importation might be uncovered. Henry R. Jackson

<sup>47</sup> Swisher, *Roger B. Taney* (1935), 530-531; Tyler, *Memoir of Roger Brooke Taney* (1876), 397-398; Black to Upham, Aug. 4, 1859, Letter Bk. B-2, 219; Black to Upham, April 25, 1860, *id.*, 397; Stanton to Black, Mar. 2, 1861, *id.*, 698; Upham to Black, Oct. 12, 1859, A. G. Ms.; Upham to Black, Dec. 16, 1859, *ibid.*; Lewis to Black, Mar. 5, 1860, *ibid.*; Lewis to Black, April 6, 1860, *ibid.*; Miller to Black, July 20, 1860, *ibid.*; Lewis to Buchanan, Aug. 3, 1860, *ibid.*; Lewis to Buchanan, Aug. 9, 1860, *ibid.*; Lewis to Black, Aug. 29, 1860, *ibid.*; Lewis to Buchanan, Feb. 22, 1861, *ibid.*

<sup>48</sup> Crittenden to Fillmore, Jan. 17, 1851, 5 Op. 287; Cushing to Pierce, Nov. 14, 1853, 6 Op. 220; Cushing to McClelland, June 3, 1854, *id.*, 500; Thomas to McClelland, Feb. 9, 1855, A. G. Ms.; Thomas to Cushing, June 6, 15, 1855, *ibid.*; Guthrie to Cushing, Aug. 1, 1855, *ibid.*; Cushing to Thomas, Aug. 11, 1855, *ibid.*; Cushing to Law, Aug. 18, 1855, *ibid.*; Cushing to Sec. Int., Dec. 16, 1853, 6 Op. 229.

of Savannah, a cousin of Secretary of the Treasury Cobb, was employed as special counsel for the government."<sup>49</sup>

Prosecutions were instituted in Georgia, South Carolina, and Alabama, as the culprits and their human stock in trade were found widely scattered. Jackson and the district attorneys, although supplied by Black and Buchanan with secret agents, found themselves badly handicapped. The marshal in Georgia, retreating before public opinion, had to be removed. It was difficult to obtain the requisite funds for the expensive investigation which Jackson was convinced would be needed to break the rich slaving business and its influential backers. Failure to enforce the slave-importation laws in the South would be made an excuse in the North for trampling under foot the fugitive slave laws. "This is no question of town-meeting politics," wrote Black, "but a great judicial cause involving principles of obedience, loyalty and good order, in which the whole nation is interested." "<sup>50</sup>

Although the *Wanderer* was condemned, the prosecution of those implicated was a failure. No greater success attended Buchanan's efforts in the case of the *Echo*, which had been captured by the United States naval vessel *Dolphin* and brought into Charleston in August 1858, with 300 Africans aboard. Immediately the local populace and authorities contemplated various legal and illegal steps for seizing the Negroes from federal custody. The miserable blacks, many of them ill, were removed to Fort Sumter, and then upon instructions from the President shipped back to Africa on a United States frigate and freed. Under directions from Black, prosecutions were brought against the officers and crew of the *Echo*.<sup>51</sup>

<sup>49</sup> Message of Jan. 11, 1859, Richardson, *op. cit.*, V, 534; Mabry to Ganahl, Dec. 8, 1858, A. G. Ms.; Ganahl to Mabry, Dec. 13, 1858, *ibid.*; Ganahl to Hilleyer, Dec. 15, 1858, *ibid.*; Jackson to Cobb, Dec. 17, 1858, *ibid.*

<sup>50</sup> Turnley to Black, June 22, 1859, A. G. Ms.; Jackson, *The Wanderer Case* (1891), 43-46; Black to Conner, Mar. 17, 1860, Letter Bk. B-2, 356; Black to Ganahl, Jan. 31, 1859, *id.*, 75; Cobb to Jackson, April 2, 1859, *id.*, 119; Black to Jackson, Dec. 14, 1859, *id.*, 292; Message of Jan. 11, 1859, Richardson, *op. cit.*, V, 534; Message of Feb. 15, 1859, *id.*, 538; Thompson to Black, July 11, 1859, Jud. Letter Bk. 5, D. of I., 171; Ganahl to Black, Dec. 25, 28, 1858, A. G. Ms.; Stewart to Cobb, Dec. 27, 1858, *ibid.*

<sup>51</sup> Fed. Cas. 17,139 (1860); Message of Dec. 19, 1859, Richardson, *op. cit.*, V, 553; Black to Conner, Mar. 17, 1860, Letter Bk. B-2, 356; Miles to Carew, Aug. 30, 1858, A. G. Ms.; McGrath to Wayne, Sept. 11, 1858, *ibid.*; Conner to Buchanan, Aug. 30, Sept. 1, 1858, *ibid.*; Hamilton to Buchanan, Sept. 2 and 20, 1858, *ibid.*; Black to Conner, Sept. 9, 1858, Letter Bk. A-3, 293.

An attempt to free the prisoners by writs of habeas corpus was defeated by federal District Judge Magrath, who also recommended to the President that Isaac W. Hayne, the Attorney General of South Carolina, be retained to assist the district attorney in the cases. He believed it wise in such trials that "*the truth, that the law of the U. S. in this matter is the law of the State, should be manifested by the chief law officer of each being concerned in the trial.*" Hayne, fearing the political effect of such a step, was with difficulty persuaded to take part, which he did in the name of his private firm."<sup>18</sup>

As the trial approached, the prospects for the success of the prosecution were not promising. The prisoners were wealthy and able to afford eminent counsel. Evidence and impartial juries were difficult to obtain. Former Governor Adams, who had advocated reopening the slave trade, was believed to have such influence over his followers that, while they would refuse on full evidence to convict the slavers, they would not hesitate to convict of piracy the commander of the United States vessel which had captured the *Echo*! "Public opinion is opposed to the execution of the law," Black wrote the district attorney, "but that will be as nothing in the eyes of men who swear that it *shall* be executed." When the circuit court convened in April 1859 to try the slavers for piracy, the jury took ninety minutes to acquit one set of prisoners and ten minutes to acquit the other."<sup>19</sup>

Unfortunately the federal government's efforts to enforce the fugitive slave laws and those against importation, even had they been successful, could hardly have achieved much, for the truce of which the former was a part had been repealed in 1854 by the Kansas-Nebraska Act. In 1857 the most famous decision of Taney's long reign, *Dred Scott v. Sandford*, opened the territories to slavery. The doctrines advanced in the *Dred Scott* case, obnoxious though they were to all opponents of slavery, contained little that was new. In maintaining that Negroes were not "citizens" in the sense that the term appeared in the Constitution, Taney reaffirmed the views which

<sup>18</sup> *In re Bates, et al.*, Fed. Cas. 1099a (1858); McGrath to Wayne, Sept. 11, 1858, A. G. Ms.; Conner to Black, Oct. 14, 1858, A. G. Ms.; Hayne to Black, Oct. 14, 1858, *ibid.*

<sup>19</sup> Conner to Black, Oct. 2, 1858, A. G. Ms.; Black to Conner, Oct. 6, 1858, Letter Bk. A-3, 297; Charleston *Mercury*, Dec. 2, 1858; *id.*, April 18, 20, 21, 1859.

he had expressed in his opinion on the South Carolina Negro Seamen Acts. Support for these views he found in official opinions rendered by William Wirt and Caleb Cushing. In announcing that the Missouri Compromise was unconstitutional because Congress had no power to regulate slavery in the territories, Taney again saw eye to eye with Cushing, who had gone out of his way to lay down this proposition in an opinion rendered to the Secretary of the Navy in 1855. The validity of the Compromise of 1820 had of course been disputed at the time of passage, and Attorney General Wirt had taken the position that though constitutional as to territories the measure could not bind states subsequently admitted to the Union from the Louisiana Purchase.

The dream that the slavery controversy could be terminated by judicial decision was soon dissipated. The new and vigorous Republican party could not be expected to acquiesce in a decision which annihilated its principal tenet. "If the the policy of the Government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court," Abraham Lincoln, Republican, wrote in true Jacksonian vein, "it is plain that the people will have ceased to be their own rulers, having turned their government over to the despotism of the few life officers composing the court." <sup>84</sup>

With South Carolina well on her way out of the Union, and his cabinet divided in counsel, Buchanan read the signs of the times and on November 17, 1860, asked Attorney General Black for his opinion on the President's power to deal with secession. Could the military be used to enforce the federal laws or to prevent a state from seceding? The courts and their officers were the ordinary means of enforcing the laws, Black replied. Only upon clear evidence of their incapacity to cope with the power opposing them

<sup>84</sup> *Dred Scott v. Sandford*, 19 How. 393 (1857); Ford, *J. Q. Adams' Writings* (1917), VII, 2; *J. Q. Adams' Memoirs* (1875), V, 6-9; Wirt to Crawford, Nov. 7, 1821, 1 Op. 506; Cushing to Dobbin, Oct. 24, 1855, 7 Op. 571; Cushing to Marcy, Oct. 31, 1856, 8 Op. 139, 142; Nicolay and Hay, *Abraham Lincoln* (1890), 338, n. 28 (On the suggestion of Seward, Lincoln changed this wording to read, "The candid citizen must confess that if the policy of the Government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." *Id.*, 338); see McMaster, *History of the United States* (1913), VIII, 324.



could the military be called to aid them, even then remaining always strictly subject to the civil authority for whose support it was summoned. If this federal civil authority ceased, as would happen in a seceded state, the one pretext for the use of military force would not exist at all. For the laws could not be executed where the civil machinery was dead.

To send troops into a state under such circumstances would be to make war on the people of the state. Whether, when states seceded, war could be levied against them was for Congress alone to decide. Black thought it unlikely that this could be done under the Constitution. "And if Congress shall break up the present Union, by unconstitutionally putting strife and enmity and armed hostility between different sections of the country, instead of the domestic tranquillity which the Constitution was meant to insure, will not all the States be absolved from their federal obligations?" he asked. "The Union must utterly perish at the moment when Congress shall arm one part of the people against another for any purpose beyond that of merely protecting the General Government in the exercise of its proper constitutional functions." \*\*

On Black as on Buchanan fell the storm of abuse with which the North greeted the President's message of December 3, 1860, and the opinion of November 20. Attorney General Black was painted as a traitor and as the author of Buchanan's secessionist doctrine. For years he lived in the memory of the Radicals as a Copperhead. "For myself I value as highly as anybody the recollection that I once seemed to have some portion of the public confidence," Black wrote in justification. "But it will give me far more pride for the balance of my life to remember that I risked and lost it in a faithful support of principles which sooner or later will be acknowledged as necessary for the preservation of the noblest political system that the world ever saw." \*\*

As events moved nearer a crisis, Black began to repent his early stand. In amplifying his views for Buchanan shortly before Con-

\*\* Black to Buchanan, Nov. 20, 1860, 9 Op. 516, 525-526; Brigance, *Jeremiah Sullivan Black* (1934), 84; Moore, *Works of James Buchanan* (1910), XI, 20.

\*\* Richardson, *op. cit.*, V, 626-653; Brigance, *op. cit.*, 86-87; Black to Woodward, Nov. 24, 1860, *Black Papers*, Lib. Cong., quoted in Brigance, *op. cit.*, 89.

gress assembled in December, he balanced against the doctrine that Congress could not preserve the Union by force the theory of a "necessarily perpetual" Union from which no state could lawfully withdraw or be expelled. With the cabinet and the Union rapidly crumbling, Black, now Secretary of State, and particularly the new Attorney General, Edwin M. Stanton, emerged as supporters of a firm policy toward the South."

The disintegration of federal authority in the South was soon marked by the collapse of the machinery of federal justice. On learning of Lincoln's election in November 1860, the federal grand jury at Charleston declined to proceed with its duties, the foreman declared that "the verdict of the ballot box on yesterday has swept away the last hope for the permanence of the Federal Government of these several States," and the judge discarded his gown and resigned his federal office. In Mississippi the district judge took the position that his office had, on the secession of his state, become "utterly extinct," while the marshal refused to "hold office under an administration that proposes to degrade the people of fifteen sovereign states to an equality with an inferior and servile race." Other federal judges and officers sent formal resignations. A few expressed regret. "I hope you will accept my resignation and appoint my successor immediately," wrote Robert P. Dick, district attorney for North Carolina, to President Buchanan, "as Mr. Lincoln may find some difficulty in finding any one to accept a commission from him." "

" Brigance, *op. cit.*, 89, 92-101; Gorham, *Life and Public Services of Edwin M. Stanton* (1899), I, 151-157.

" Channing, *History of United States* (1930), VI, 257; McGrath to Buchanan, Nov. 7, 1860, A. G. Ms.; Gholson to Buchanan, Jan. 10, 1861, *ibid.*; Tison to Buchanan, Feb. 21, 1861, *ibid.*; Dick to Buchanan, Feb. 11, 1861, *ibid.*

## CHAPTER X

### LAW AND THE SWORD

CIVIL war crowded aside the regular modes of justice. To be his Attorney General Lincoln named Edward Bates, an elderly Free Soil Whig, a native of Virginia, and long a respected citizen of Missouri. He had definite anti-slavery leanings, but he had also an understanding of the South and of southern people which precluded his sharing the extreme sentiments of William H. Seward and Salmon P. Chase, two of his prominent cabinet colleagues. At no time did he demonstrate any great desire for leadership in the struggle,<sup>1</sup> but he kept a diary in which he recorded the little irritations of great years.

Bates attended his first cabinet meeting on March 6, 1861, and found it uninteresting. He advised against sending provisions to Fort Sumter, lest it make war inevitable. "True, war already exists by the act of South Carolina; but this Government has thus far, magnanimously forborne to retort the outrage," he said on March 16. "And I am willing to forbear yet longer, in the hope of a peaceful solution of our present difficulties." A month later he was still convinced that the South could be brought to submission by the mere closing of southern ports.<sup>2</sup>

His patience began to give way, however, when disloyal Marylanders destroyed bridges and resorted to riot to prevent the movement of northern troops through Baltimore. "Affirmative and

<sup>1</sup> *Diary of Edward Bates* (Beale ed. 1933), 107 n. 18, 342, 354, 356. Edward Bates (1793-1869) was born in Virginia, went to St. Louis in 1814 where he studied law, was a member of the Missouri constitutional convention of 1820, became successively attorney general of the state, a member of the legislature, a member of Congress, United States attorney, served in both houses of the state legislature, and took an active part in state and national politics. He was a prominent contender for the Republican nomination for the Presidency in 1860 and then served as Attorney General of the United States (1861-1864). Thereafter he was influential in the struggle with the Radicals in Missouri until his death. See *The Diary of Edward Bates* and Dict. Am. Biog., II, 48.

<sup>2</sup> *Bates Diary*, *op. cit.*, 177, 179, 184.

progressive measures are absolutely necessary to our safety," he thought. "Among the malcontents in Baltimore there are some men of position and influence, who are now so far perverted and so deeply committed that it is a waste of reason to argue with them." \* The President soon issued orders calling the militia into service, blockading the southern ports, and suspending the writ of habeas corpus.<sup>4</sup>

The need for suspending the writ grew out of the fact that, if trials were held, witnesses could be expected to refuse to testify against offenders, and, if postponed, those accused might be set free on habeas corpus proceedings. There was doubt whether the President had the right to suspend the writ without authorization from Congress. The writ, of course, was a traditional means of preventing imprisonment without a speedy trial, but the Constitution recognized that it might be suspended in case of insurrection or rebellion.

Soon Judge William F. Giles of the federal district court in Baltimore issued such a writ for a minor enlisted in the United States army without the consent of his parents. Major W. W. Morris handed the writ back to the deputy marshal with the remark that he would see the court and the marshal damned before he would surrender one of his men. Judge Giles directed the commander of Fort McHenry to show cause why attachment should not issue against him for disobedience. "With no suspension of this great writ by competent authority—with no proclamation for its suspension by any one claiming to possess such power—with no such state of affairs existing as would authorize its suspension—the Court learns with deep regret that an officer of the United States army has thought it his duty to refuse obedience to the writ." \*

Major Morris, reading in a newspaper the statement issued by Judge Giles, wrote a letter to the judge calling attention to the riotous conditions which had prevailed in Baltimore. The writ of habeas corpus in the hands of an unfriendly power might depopulate the fort and place it at the mercy of a mob in less time than

\* *Id.*, 186; Bates to Banks, June 16, 1861, Letter Bk. B-2, 75.

<sup>4</sup> 10 Op. 11; 12 Stat. 1238, 1259; Richardson, *op. cit.*, VI, 18, 19.

\* Baltimore *Exchange*, May 3, 1861.

it could be done by all the appliances of modern warfare. Furthermore, he was disinclined to appear in public to defend the interests of the army, in view of the ferocious spirit of the community toward it. The judge filed the letter as the Major's reason for not obeying the writ, and the papers dealing with the case were sent to the Attorney General.\*

Before any public announcement of policy, a similar case of greater importance arose in the same locality. John Merryman, an active secessionist, was arrested by military authorities and confined in Fort McHenry for treasonable activities. He petitioned for a writ of habeas corpus, not to Judge Giles but to Chief Justice Taney. On May 26, 1861, Taney issued the writ directing General George Cadwalader to bring Merryman before him. Instead, Cadwalader sent a statement summarizing the facts of the case, calling attention to the President's order, and requesting postponement until the President could be consulted. Taney directed an attachment against Cadwalader for disobedience, but the marshal who sought him at Fort McHenry was not permitted to enter. Taney could do nothing but submit. He wrote an opinion, however, on the illegality of the suspension of the writ without authorization from Congress and sent it to President Lincoln, calling on him to perform his constitutional duty to enforce the laws.<sup>†</sup> A furor of partisan excitement ensued. By southern sympathizers Taney was hailed as the defender of liberty against the aggression of military power. By abolitionists he was denounced as a hoary apologist for treason.

The case received widespread publicity, and other persons arrested under similar circumstances likewise sought judicial relief. When asked for advice, the Attorney General replied on June 4, 1861, that the government had not yet come to any definite policy. "Unofficially," he explained, "I remark that words and phrases are often more influential than facts and things: men are apt to object more strenuously to the 'suspension of the writ of *habeas corpus*' than to actual imprisonment. In the presence of an army

\* Morris to Giles, May 6, 1861, A. G. Ms.; Giles to Morris, May 7, 1861, *ibid.*; Addison to Bates, May 8, 1861, *ibid.*; Bates to Addison, May 10, 1861, Letter Bk. B-2, 721.

<sup>†</sup> *Ex parte Merryman*, Fed. Cas. 9487; see Swisher, *Taney, op. cit.*, 550-556.

and in view of its necessity, men do very quietly submit to the seizure of their property, but would cry aloud if the General presumed to suspend the writ of *Detinue & Replevin*. The President is required, by the Constitution and the statutes to suppress insurrection. The *manner* of doing it is not prescribed. The means of doing it are expressly given, viz: the Army, the Navy and the militia—Draw your own inferences." \*

During the month of June the administration resolved to stand by its suspension of the writ. In his message of July 4, 1861, to the special session of Congress, the President called attention to the controversy and stated the belief that he had acted lawfully. "Are all the laws *but one* to go unexecuted," he asked, "and the Government itself to go to pieces lest that one be violated?" He left more extended argument to the opinion of the Attorney General, which was submitted the following day. Bates drew a distinction. While the President could not suspend the power of the courts to issue the writ itself without specific authorization from Congress, he could suspend the *privilege* of the writ by refusing to release those held for rebellious acts. In short, the courts could order but the executive could refuse to obey."

The power was utilized as an effective instrument for curbing the influence of various prominent sympathizers with the southern cause whose activities were undoubtedly subversive but were nevertheless of such a character that prosecution for specific violations of the law was inexpedient. The mayor and police commissioners of Baltimore were taken into custody and lodged in Fort McHenry without being charged with any offense. Influential members of the legislature and other persons of prominence in Maryland and elsewhere received the same treatment. Habeas corpus petitions were of no avail. If judges persisted in issuing writs, military authorities ignored them.<sup>10</sup>

In the meantime the Attorney General and the district attorneys throughout the country busied themselves with other wartime tasks. From the beginning charges of treason were loosely bandied about,

\* Bates to Coffey, June 4, 1861, Letter Bk. B-2, 744.

<sup>9</sup> Richardson, *op. cit.*, VI, 25; 10 Op. 74.

<sup>10</sup> Swisher, *Taney, op. cit.*, 556-557.

and letters poured in to the Attorney General asking advice and help. A marshal in Illinois reported that people in his district were giving valuable information to the enemy and were engaged in recruiting. "There are beyond doubt *some* traitors in our midst," reported the district attorney in Philadelphia, "and *some* sources from which the rebels are supplied with material aid for treason." The district attorney at St. Louis reported that a large number of persons, including the governor of the state, had been indicted for treason, and asked the aid of an assistant in the prosecutions.<sup>11</sup>

Bates was broadly general in the advice which he gave. "Treason is only the highest crime known to our law," he declared. "But the law of treason, and the duties of the officers in regard to it, are as plainly laid down in the Constitution and the Statutes, as in regard to any other crime." He was of the opinion that an excellent moral effect might be produced by the prosecution of some of the most "pestilent fellows," but at the same time believed judicious care necessary to prevent reaction. "Better let twenty of the guilty go free of public accusation,—than to be defeated in a single case," he warned. "I think it very probable that you may find cases short of treason—*e.g.* conspiracy—violating the mail and the like. A few convictions for that sort of crime, I think would help the cause, by rubbing off the varnish from romantic treason, and showing the criminals in the homely garb of vulgar felony."<sup>12</sup>

Treason indictments were found in great numbers in some districts, in spite of the fact that the punishment prescribed by statute was death. At the special July term of the federal court at St. Louis, twenty-five indictments were returned. In addition the court appointed some forty commissioners who might require persons accused of "talking treason" to give bond for good behavior. The marshal at Cleveland saw evidence of treason in the activities of a secret organization similar to the Knights of the Golden Circle, one of the purposes of which was "Mutual protection of its members against the Damned Abolitionists." Reports of other secret organizations

<sup>11</sup> Phillips to Bates, May 13, 1861, A. G. Ms.; Coffey to Bates, May 14, 1861, *ibid.*; Jones to Jordan, June 10, 1861, *ibid.*

<sup>12</sup> Bates to Phillips, May 18, 1861, Letter Bk. B-2, 731; Bates to Jones, July 1, 1861, Letter Bk. B-2, 756.

and treasonable acts such as "praising & drinking the health of Jefferson Davis and the Southern Confederacy" continued to pile up in the office of the Attorney General throughout the period of the war.<sup>13</sup>

Disloyal activities occurred on such a large scale in some of the border states that trial juries could not be expected to indulge in the wholesale slaughter which would result from sweeping convictions for treason. A conspiracies act was passed at the special session of Congress in 1861, providing punishment by fine and imprisonment for treasonable acts. A year later the law of treason itself was amended to give courts the discretion of applying a lesser punishment than death. Under this modified legislation, grand juries found indictments with great enthusiasm. The district attorney in what is now West Virginia complained of excessive zeal in these matters and declined to call the grand juries into further session. "I regard my office at this time," he reported, "as one of policy more than law." Yet at one time seven or eight hundred indictments for treason were pending in this area.<sup>14</sup>

More difficult legal problems arose from the war at sea. The Confederacy early resorted to issuing letters of marque, empowering privately owned vessels to prey upon the shipping of the United States. Large numbers of privateers were fitted out, though the statutory penalty was death, as in the case of treason. In July 1861, the *Savannah*, the first privateer commissioned, was captured and taken to New York, and the officers and crew in irons were lodged in the Tombs to await trial for piracy. Jefferson Davis tried in vain to secure an exchange of prisoners and then notified President Lincoln that if the privateersmen were punished as contemplated he would retaliate upon an equal number of captured Union soldiers.<sup>15</sup>

The prisoners were tried in the federal circuit court before Jus-

<sup>13</sup> Jones to Bates, Aug. 5, 1861, A. G. Ms.; Bill to Smith, Aug. 28, 1861, *ibid.*; Chase to Bates, Sept. 2, 1861, *ibid.*

<sup>14</sup> 12 Stat. 284, July 31, 1861; *id.*, 589, July 17, 1862; Smith to Bates, May 16, 1862, A. G. Ms.; Smith to Bates, May 8, 1862, *ibid.*; Addison to Bates, June 5, 1862, *ibid.*

<sup>15</sup> McMaster, *History of the People of the United States, During Lincoln's Administration* (1927), 115.



tice Nelson of the Supreme Court, assigned to that circuit, and Judge Shipman. William M. Evarts and Samuel Blatchford, the one destined later to be Attorney General of the United States and the other to be a member of the Supreme Court, assisted the district attorney in prosecuting the case. The defense included Daniel Lord, James T. Brady, and other prominent lawyers. The jury could not agree among themselves, and Jefferson Davis was not called upon to make good his threat.<sup>16</sup>

Another privateer, the *Jeff Davis*, had been captured and the prisoners landed at Philadelphia. They were to be tried for treason or piracy. "The trials will be numerous, protracted, and important; and the prisoners will be defended very ably and skilfully," District Attorney Coffey wrote Bates, "for they have wealthy backers in Charleston, who will spare no expense or labor to get up a defense." Coffey was warned to be careful to bring to trial first only such prisoners as he could "most certainly" convict. The trial was held before Justice Grier of the Supreme Court of the United States and District Judge Cadwalader. "This court, sitting here to execute the laws of the United States," said Justice Grier, "can view those in rebellion against them in no other light than as traitors to their country, and those who assume by their authority a right to plunder the property of our citizens on the high seas as pirates and robbers." Walter W. Smith, who had charge of a prize crew, was found guilty. Pursuant to his threat, Jefferson Davis directed the attorney general of the Confederacy that one from among the prisoners of highest rank taken at Bull Run be selected, treated as a convicted felon, and executed in the same manner as the United States might execute Smith.<sup>17</sup>

At Philadelphia a motion was made for a new trial and an arrest of judgment, and the Attorney General was asked for advice. Bates replied that there were reasons not for publication which made it desirable to delay. "You know that the insurgent government has avowed the purpose of taking an atrocious vengeance, for any punishment which we may inflict upon these convicts," he wrote.

<sup>16</sup> *U. S. v. Baker*, 5 Blatchf. 6 (1861).

<sup>17</sup> Coffey to Bates, Aug. 19, 1861, A. G. Ms.; Coffey to Coffey, Aug. 19, 1861, Letter Bk. B-4, 112; *U. S. v. Smith*, Fed. Cas. 16,319; McMaster, *op. cit.*, 116.

"And although it be true that the Government ought not, and I hope will not, allow itself to be bullied one step out of its line of legal justice and sound policy, still it is desirable to avoid, if we can, a conflict so terrible—a conflict, which once fully begun would, I fear lead to the utter desolation of a great portion of the Southern States." The case was not carried to final judgment, and the prisoner was moved to a fortress in New York.<sup>18</sup>

Three other persons were convicted in the circuit court at Philadelphia, in the face of strong charges from both judges in favor of acquittals. When government counsel proposed to go on with other cases, Justice Grier refused to have anything to do with them. He did not intend to go on trying charges against a few unfortunate men in Philadelphia out of half a million in arms against the government. He saw no reason for differentiating between prisoners taken on land and on sea. "Why not try all those taken on the land and hang them?" he asked. "That might do with a mere insurrection; but when it comes to civil war, the laws of war must be observed." He would try them after the insurrection was suppressed, or he would try the leaders at once if produced. "But I must say I see no use of this course, and I do not approve of it," he concluded. "I suppose the Government does not care whether I do or not; but I will not sit in another case."<sup>19</sup>

Government counsel then sought to try the cases before the district judge, but he ordered postponement.<sup>20</sup> Thereafter these and similar cases were merely kept on court dockets throughout the period of the war, eventually to be dismissed. The government never frankly renounced its position that all Confederates making war on the United States were traitors and all Confederate privateersmen pirates, but circumstances forced the treatment of these persons virtually as citizens or subjects of a recognized foreign state.

The argument that the conflict was a mere insurrection within

<sup>18</sup> Bates to Ashton, Nov. 20, 1861, Letter Bk. B-4, 218; *Bates Diary*, *op. cit.*, 230, 237-238.

<sup>19</sup> Ashton to Bates, Nov. 4, 1861, A. G. Ms.; Enclosure, Ashton to Bates, Nov. 4, 1861, *ibid.*

<sup>20</sup> *Philadelphia Inquirer*, Nov. 13, 1861, clipping, *ibid.*; Ashton to Bates, Nov. 13, 1861, *ibid.*

the United States was urged by the government to discourage foreign recognition of the Confederacy. It became necessary to call into use the laws of war, however, in blockading the southern ports and making prize of neutral vessels. Critics argued that either the conflict was not a war and the capture of prize, therefore, illegal, or the acceptance by the United States of the conditions of war was an admission of the existence of an opponent in arms subject to recognition by other governments. The issues were brought out in a series of prize cases tried in federal courts in New York and Boston.

These reached the Supreme Court together as the *Prize Cases*. They were argued for twelve days. The management of the government's case was placed in the hands of Charles Eames, an international lawyer of prominence, with whom were associated William M. Evarts, Richard H. Dana, and Charles B. Sedgwick. Eames succeeded in making himself so obnoxious to the Court that Justice Swayne, one of the three judges recently appointed by President Lincoln, warned the Attorney General to get rid of him. Bates was much disturbed. The other government counsel were more fortunate. The justices and the audience were carried away by Dana's eloquence. Justice Grier patted him on the shoulder and said it was the best argument he had heard in five years. Seward and others were flattering, and Bates seemed overcome with emotion.<sup>21</sup>

Counsel and the Court regarded the issues as those of a major crisis. "Contemplate, my dear sir, the possibility of a Supreme Court deciding that this blockade is illegal," Dana wrote a friend. "What a position it would put us in before the world whose commerce we have been illegally prohibiting, whom we have unlawfully subjected to a cotton famine and domestic dangers and distress for two years! It would end the war, and where it would leave us with neutral powers it is fearful to contemplate!" In an opinion written by Justice Grier, four justices dissenting, the Court rose to the occasion. The right of prize and capture, he declared, had its origin in

<sup>21</sup> *The Prize Cases*, 2 Black 635 (1863); *Bates Diary*, *op. cit.*, 281-282; Warren, *Supreme Court*, *op. cit.*, III, 105-106.

the laws of war. To constitute a war it was not necessary that both parties should be acknowledged as independent nations or sovereign states. "It is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors," he concluded. "It is not necessary that the independence of the revolted province or state be acknowledged in order to constitute a party belligerent in a war according to the law of nations." The government prosecuted many other prize cases in the courts, but the major questions as to the authorization for the blockade were now settled and the work became largely routine."<sup>22</sup>

In another incident at sea, the United States tactfully bowed to the power of England. Captain Charles Wilkes, commander of the American steamer *San Jacinto*, took from a British vessel sailing to a neutral port two Confederate envoys on their way to England. The seizure was loudly praised in the United States. Bates was sure there was no danger that Great Britain would take offense. "The law of nations is clear upon the point," he wrote in his diary, "and I have no doubt that, with a little time for examination, I could find it so settled by English authorities."<sup>23</sup>

Great Britain protested, however, in peremptory fashion, and the United States was suddenly confronted with the question whether it would be wise to face a possible war with England. "In such a crisis, with such a civil war upon our hands, we cannot hope for success in a super added war with England, backed with the assent and countenance of France," thought Bates. "We must evade it—with as little damage to our own honor and pride as possible." Seward took the same position, the President was persuaded, and the captured envoys were released."<sup>24</sup>

New problems had arisen on land. Congress had provided for the confiscation of property moving in or out of the insurrectionary states. Another statute, generally known as the First Confiscation Act, provided for the seizure of property about to be used in furthering the rebellion. To the district attorneys this was an unfamiliar

<sup>22</sup> Adams, *Richard Henry Dana* (1890), II, 267; *The Prize Cases*, *supra*; *Bates Diary*, *op. cit.*, 293.

<sup>23</sup> *Id.*, 202.

<sup>24</sup> *Id.*, 215, 216-217.

form of legislation. They plied Bates with many questions. Were proceedings to be similar to seizures for breach of revenue laws? asked one district attorney. "Must there not be some proof that there is an *intent* on the part of the owner?" asked another. "And if the act applies so that personal estate such as horses, deposits in Banks or Bank Stock can be forfeited does it not as well apply to real estate?" Did the fact that the owner was engaged in the rebellion constitute sufficient intent that the property would be used for the purposes of the Confederacy? queried a third. Or the mere fact that the owner resided in the South? added a fourth. Could stocks and bonds, owned by residents in rebel states, but transferred to relatives, be confiscated? asked still another."

"The Attorney General has uniformly declined, in response to the inquiries of District Attorneys to give a construction to the Confiscation Act of 6 August," replied Bates in characteristic fashion. "That is the business of the Courts, and each District Attorney must judge for himself on the facts of each case, whether property is confiscable within the terms of the Act." But when one zealous district attorney proposed to apply the statute to all property because "the use of this property for the payment of debts, supporting family, or friends dependent on him, aids the rebellion by giving leisure and time to devote his undivided attention to the rebellion," he was told that the act would hardly bear such a liberal construction.

The actual enforcement of the act was doubtless promoted by the pecuniary interest of private informers who were entitled to half the proceeds, but doubts as to procedure and difficulties in the way of proving that property was to be used for insurrectionary purposes stood in the way of widespread confiscation. The dissatisfaction of those who felt that rebel property should be taken, whether used in the rebellion or not, led to amendatory legislation on July 17, 1862. Whether or not used to promote the war, the property of officers of the Confederate federal and state governments was

<sup>\*\*</sup> 12 Stat. 257, July 13, 1861; *id.*, 319, Aug. 6, 1861; Nourse to Bates, Sept. 10, 1861, A. G. Ms.; Willey to Bates, Sept. 7, 1861, *ibid.*; Harris to Smith, Aug. 24, 1861, *ibid.*; Stevens to Bates, Sept. 12, 1861, *ibid.*; Dorr to Bates, Sept. 20, 1861, *ibid.*

to be seized as well as the property of others engaged in the rebellion who did not return to allegiance within sixty days."

Although there were no awards to informers for seizures under this act, a great variety of items were reported as subject to confiscation. The earlier confiscation act remained in force; and under it three Texans sought to add to their estates by reporting a number of railroads as having been used in aid of the rebellion, claiming one half the property for themselves. They magnanimously agreed to put one half their share in trust for the state school fund, to be available when the state returned to the Union."

The enforcement of the second confiscation act met with many difficulties. A district attorney in Cincinnati complained of lack of time and facilities to search land records and records of corporations for evidence. The Assistant Attorney General explained that no appropriation had been made for this purpose, but thought vigilance and energy would have results. Marshals were bewildered at the task of appropriating a life estate in property, rather than the property itself. The War Department as well as the Department of State encroached frequently upon what Bates regarded as his own prerogatives. While military officers frequently showed more zeal and enterprise in seizing what they regarded as enemy property than did the peace officers, they paid less homage to the rules of legal procedure. In St. Louis and Alexandria provost courts were set up to facilitate military appropriations of enemy property, only to be stopped finally by a general order from the President."

Military interference continued, however, and on November 13, 1862, Lincoln charged the Attorney General with superintendence and direction of all proceedings under the confiscation measures.

<sup>\*\*</sup> Coffey to Nourse, Sept. 17, 1861, Letter Bk. B-4, 141-142; Smith to Bates, Dec. 2, 1861, A. G. Ms.; Coffey to Smith, Dec. 12, 1861, Letter Bk. B-4, 237; 12 Stat. 589, July 17, 1862.

<sup>\*\*</sup> Underwood to Bates, Mar. 27, 1862, A. G. Ms.; Ives to Bates, Dec. 30, 1862, *ibid.*; Hayes to Bates, Dec. 31, 1862, *ibid.*; Brown to Bates, Mar. 11, 1863, *ibid.*; Keasby to Bates, June 1, 1863, *ibid.*; Alexander to Bates, June 10, 1864, *ibid.*

<sup>\*\*</sup> Ball to Bates, Jan. 24, 1863, *ibid.*; Coffey to Ball, Feb. 4, 1863, Letter Bk. B-5, 359; Bates to Price, Sept. 2, 1863, Letter Bk. C, 249; Bradley to Bates, Sept. 12, 1863, and enclosures, A. G. Ms.; Bates to Close, Sept. 16, 1863, Letter Bk. C, 260; Bates to Underwood, Dec. 8, 1863, *id.*, 340; 10 Op. 152; Bates to Smith, Mar. 5, 1862, Letter Bk. B-5, 28.

Commanders grumbled at the slowness of legal procedure and meagerness of confiscations. Sometimes they seized property outright, much to the exasperation of the Attorney General. "I am often mortified at being obliged to witness such encroachments," Bates noted in his diary. "I have never interfered with military seizures for mere military purposes; but I feel it to be my duty to denounce, if I cannot prevent, the frequent instances of needless, groundless and wanton interference of the military, in matters which, in no wise concern them, as if the object were to condemn and degrade the civil power." <sup>80</sup>

In Baltimore, claiming that the district attorney was sleeping over his duty, General Lew Wallace proceeded to condemn without the intervention of judge or jury. When the district attorney permitted delay in completing the confiscation of the property of a Confederate general, Wallace summoned the tenants and directed that the rents be paid to him. Without legal process and without notification to the district attorney, he ordered a Baltimore bank to pay to him money due persons in the South. Bates wrote the General a letter of protest and received a reply which he declared to be worse than the original orders. He took the matter up with the President. "I must and would protect my office and myself," he threatened, "and, to that end, if General Wallace's proceedings be not stopped, I would leave of record, in the office, my solemn protest against the military usurpation." Again the President interfered. Secretary of War Stanton, acting with great reluctance, was persuaded to direct General Wallace not to enforce his confiscation orders. <sup>81</sup>

In terms of yield to the government, the Captured and Abandoned Property Act was far more fruitful than the other confiscation measures. <sup>82</sup> This was true, among other reasons, because the purpose of this act was to appropriate enemy property in the South

<sup>80</sup> Richardson, *op. cit.*, VI, 124, 160; Jan. 8, 1863, Letter Bk. B-5, 340-341; *Bates Diary*, *op. cit.*, 350; see Wallace to Bates, June 1, 1863, Wallace to Gamble, June 19, 1863, Stanton to Bates, July 13, 1863, Price to Stanton, July 29, 1863, Stanton to Bates, Aug. 4, 1863, Brown to Bates, Aug. 6, 1863, A. G. Ms.

<sup>81</sup> Price to Bates, May 23, 1864, *ibid.*; Price to Bates, June 14, 1864, *ibid.*; Bates to Wallace, May 25, 1864, Letter Bk. C, 574; *Bates Diary*, *op. cit.*, 376, 377; Ashton to Jennings, May 27, 1865, Letter Bk. D, 345; 12 Stat. 820, Mar. 3, 1863.

<sup>82</sup> Randall, *Constitutional Problems under Lincoln* (1926), 289, 326.

regarded as spoils to which victory gave a just claim. The other acts had been intended not so much to add to the income of the government as to render southern resistance more difficult and persuade persons in rebellion to return to their allegiance. They evoked little loyalty or even pretense of loyalty. On the other hand they gave rise to an immense amount of bitterness and hatred as well as interdepartmental friction of which there was already more than enough.

When it was proposed to carve West Virginia out of the western portion of Virginia, the President, on the advice of Bates, called on each cabinet officer for written views. Bates, Blair, and Welles opposed the measure. Seward, Chase, and Stanton wrote opinions favoring the admission of West Virginia, and Bates was much disappointed when these documents were hidden from the public eye. "If publicity had been given to these opinions, from the first," said he, "I think they would have exerted a salutary influence in restraining the rising spirit of congressional ambition, and, possibly, might have prevented some of the earlier assumptions, which, being encouraged by submission and obedience, have led to the open usurpations which now, in meretricious insolence, sweep over the nation." \*\*

Bates felt that the provisional government, supported by the citizens of Virginia who had remained loyal, was a legitimate government to carry on only essential functions and provide a nucleus for the restoration of a government of all the people of the state, but that it had no such disruptive powers as would authorize dismemberment.\*\* His underlying concern was not with constitutional phrases, however, but with the preservation of his native State of Virginia. The necessities of war had led to the recognition of the provisional government. "But for that reason—for the crimes of a comparatively few individuals, which render an exact compliance with forms impossible—shall a nation be allowed to perish, a State be blotted from the map of the world? No, God forbid." After West Virginia had been admitted to the Union, Bates expressed his feelings more vividly in his diary. "Poor silly dupe! West Va.! It was conceived, as a fraudulent party trick, by a few unprincipled

\*\* Bates to Stanbery, Aug. 3, 1867, A. G. Ms.

\*\* 10 Op. 426.



Radicals, and the prurient ambition of a few meritless aspirants urged it, with indecent haste, into premature birth (lest their only chance for personal distinction should be lost forever).”<sup>14</sup>

While slavery was one of the major causes of the Civil War, few of the activities of the Attorney General during the hostilities had direct concern with the colored race. Many diary comments indicate Bates' impatience with the activities of the friends of the Negroes, and he made it clear that he was not an abolitionist in the conventional sense of the word. Yet he assented to the Emancipation Proclamation. He wrote an opinion holding that free colored men born in the United States were citizens.<sup>15</sup> He wrote another opinion urging that redress be demanded from the Confederacy in connection with the massacre of Negro troops at Fort Pillow, Tennessee, in 1864.<sup>16</sup>

Throughout the war the suspension of the writ of habeas corpus continued to create friction and difficulties. Despite the opinion of the Attorney General on the subject, the power of the President to suspend the writ without congressional authorization continued to be debated until March 3, 1863, when an act was passed giving the consent of Congress. Then the state judges made an increasing amount of trouble for the federal government by issuing writs of habeas corpus for persons taken into the army by means of the draft, to the wrath of the President who declared that no honest man could believe that state judges had such power. Bates, too, felt that no judicial officer could take a prisoner or soldier out of the hands of the President by habeas corpus and recommended refusal of obedience, by force, if need be; but he was opposed to the idea held out by some that the judge issuing the writ should be imprisoned. The outcome was a presidential order directing the refusal of obedience and a proclamation suspending the writ under the act of Congress.<sup>17</sup>

The Supreme Court of the United States had not yet passed upon

<sup>14</sup> *Id.*, 430; *Bates Diary, op. cit.*, 508.

<sup>15</sup> *Id.*, 291, 292, 331, 353, 371, 383; Rhodes, *History of the United States* (1904), IV, 161; 10 Op. 382.

<sup>16</sup> *Bates Diary, op. cit.*, 365; 11 Op. 43; Rhodes, *op. cit.*, V, 512-513.

<sup>17</sup> 10 Op. 74; 12 Stat. 755, Mar. 3, 1863; *Bates Diary, op. cit.*, 306-307; Richardson, *op. cit.*, VI, 170-171.

the question of the power of state judges to interfere by habeas corpus with military custody. When some months earlier Stanton had contemplated appealing a Wisconsin state case to the Supreme Court, Bates advised against it. Knowing the leanings of a majority of the Court, he had serious doubts whether the position of the government would be sustained. To seek a decision and then meet defeat would be a disaster more serious than any yet sustained by the Union armies. "If, as I do not believe, the Court should sustain the arrest, all would be well. But if they should refuse to do so, in what position does it place the Executive!" exclaimed Bates. "For how can he reject the rule of the arbitrator to whom he has submitted? And if he does conform to that rule, he will be compelled to pronounce a large number of the acts by which he has aimed to suppress the rebellion, illegal and unwarranted, and so confound his friends and justify his enemies and the enemies of the Union." "

This question, like many others, remained undecided at the close of the war. It was not until 1872 in *Tarble's Case* that the Supreme Court, after substantial change in its membership, decided that a state court in no event had power to carry out habeas corpus proceedings for the release of a prisoner held under the authority of the United States. "The experience of the late rebellion has shown us," said Justice Field for the Court, "that, in times of great popular excitement, there may be found in every state large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void." His opinion was based on Taney's reasons in *Ableman v. Booth*. Only Chief Justice Chase, who had been appointed by Lincoln, could not agree." This decision, had it been made at the beginning of the war, would have relieved the government from unmeasured heckling and worry.

Although Bates justified the interference with civil rights to the extent of suspending the writ of habeas corpus, he had no sympathy with the extension of military jurisdiction, particularly with arbi-

" Bates to Stanton, Jan. 31, 1863, Stanton Papers, Lib. Cong.; see Keasby to Bates, Apr. 24, 1863, A. G. Ms.; Bates to Keasby, Apr. 29, 1863, Letter Bk. C, 126; *Bates Diary*, *op. cit.*, 514.

" *Tarble's Case*, 13 Wall. 397 (1872).

trary arrests and trials by military commissions at points distant from the area of conflict. "There seems to be a general and growing disposition of the military, wherever stationed, to engross all power, and to treat the Civil Government with contumely, as if the object were to bring it into contempt," he wrote in 1863. "I have delivered my opinion very plainly to the President, and I have reason to hope that he in the main, concurs with me in believing that these arbitrary proceedings ought to be suppressed." The Bureau of Military Justice in the War Department was a fruitful source of antagonism.<sup>40</sup> Bates resigned his office late in 1864 and returned to his home in Missouri, where he wrote angry comments about the arrogance of the Radicals and the usurpation of civil powers by the military.

When President Lincoln was assassinated in April 1865, plans were made to try the assassins before a military commission. Bates was among the critics. He was scornful in his characterization of James Speed of Kentucky, the close friend whom Lincoln had appointed Attorney General when Bates retired. "It seems, that when he came into office a new man, with not much reputation as a lawyer, and perhaps, no strong confidence in his own opinions, he was caressed and courted by Stanton and Seward, and sank, under the weight of their blandishments, into a mere tool—to give such opinions as were wanted! Though my indignation rises at seeing the corruption and degradation of the *Law Department* of the Government, I cannot help pitying my poor imbecile successor!" He was pained to think that an opinion had been wheedled out of Speed to the effect that the military proceedings were lawful.<sup>41</sup>

Four of the conspirators were hanged. Soon afterward an opinion by Speed was circulated justifying the trial under what he conceived to be the international laws of war. After discoursing on Roman history and extolling American institutions, he said the assassins

<sup>40</sup> Bates to Knapp, Sept. 16, 1863, Letter Bk. C, 259; 13 Stat. 144, June 20, 1864; Ann. Rep. Sec. War, 1865-1866, 1005, House Ex. Docs., III, Pt. 2 (1866).

<sup>41</sup> *Bates Diary*, *op. cit.*, 481-484. James Speed (1812-1887) was born in Kentucky, practiced law in Louisville, was elected to the state legislature in 1847, taught law in the University of Louisville, served in the state senate, and then became Attorney General of the United States (1864-1866). Thereafter he took a prominent part in state politics, but held no public office. See Speed, *James Speed* (1914), and Dict. Am. Biog., XVII, 440.

were "public enemies" and not only could but ought to be tried by the military. The opinion was dated "July 1865," but the day on which it was written was not given. Bates, who derided the opinion as the most extraordinary he had ever read, was convinced that it had been compiled "to bolster up a jurisdiction, *after the fact*, so generally denounced, by lawyers and by the respectable press, all over the country." The preceding April, Speed had given an opinion on this subject in one sentence and without reasons."

The Supreme Court had not passed upon the power of military tribunals, but a case came before the Court soon afterward. One Milligan, in Indiana, a member of a secret organization engaged in aiding the Confederacy by obstructing military preparations in the North, was tried by a military commission and sentenced to death. Speed, Henry Stanbery, who was soon to be Speed's successor, and the spectacular General Benjamin F. Butler of Massachusetts appeared for the government in an attempt to establish the legality of the trial. Former Attorney General Jeremiah S. Black, David Dudley Field, famous New York lawyer and brother of Justice Field, and James A. Garfield, who was to be President, appeared for the prisoner.

Speed again found comfort in the "laws of war" and the fact that the President was commander-in-chief of the army. "During the war," Speed declared, "his powers must be without limit." Private rights must give way to necessity. "All peace provisions of the Constitution," he argued on the basis of an old maxim, "are silent amidst arms, and when the safety of the people becomes the supreme law." Field drew the issue. "This is not a question of the discipline of camps; it is not a question of the government of armies in the field," he said. "Indiana, at the time of this trial, was a peaceful State; the courts were all open; their processes had not been interrupted; the laws had their full sway." Milligan was a private citizen, "not belonging to the army or navy, not in any official position, not connected in any manner with the public service." Butler answered ably for the United States. "These acts of Milligan and his felonious associates took place in the theater of military operations, within the

<sup>42</sup> 11 Op. 215, 297; *Bates Diary*, *op. cit.*, 499.

lines of the army, in a State which had been and then was constantly threatened with invasion," he pleaded. "In time of war, to save the country's life, you send forth your brothers, your sons, and put them under the command, under the arbitrary will of a general to dispose of their lives as he pleases; but if, for the same purpose, he touches a Milligan, a Son of Liberty, the Constitution is invoked in his behalf—and we are told that the fabric of civil government is about to fall!"

Justice Davis wrote the opinion for the Court. "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question," said he. "Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment." The courts were open in Indiana. "The laws and usages of war," he wrote, "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Speed and his associates had insisted that the safety of the country demanded a broad field for martial law. "If this were true," replied Justice Davis, "it could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." Four justices dissented; they agreed that Congress had not authorized these military trials, but they felt that Congress *could* do so even where civil courts were open.<sup>44</sup> No one mentioned Taney's opinion in the *Merryman* case, but his reasoning was invoked.

The decision came as a blow, for it established the illegality of many of the wartime activities of the military arm of the government. "Judicial tyranny," "Dred Scott again," and similar phrases colored editorial comment. The circumstances resembled in so many important aspects the trial of the assassins of Lincoln as to create fear that the decision would result in the liberation of those of the conspirators who had not suffered the death penalty but had been impris-

<sup>44</sup> *Ex parte Milligan*, 4 Wall. 2 (1867).

oned."<sup>44</sup> It would have brought vindication and delight to Bates, had his death not preceded by a short time the announcement of the decision.

Meanwhile, many district attorneys looked to the clearing of their dockets of long pending treason cases, but in some localities the zeal for additional prosecutions led to the piling up of more indictments. There was delay in working out a policy. In March 1865, Attorney General Speed advised against immediate trial of the Baltimore cases. Six months later he wrote the district attorney at St. Louis that it was not the wish of the government to keep open the sores of the late struggle. The policy thereafter led in the direction of a cessation of prosecutions."<sup>45</sup>

There remained, however, the leaders of the Confederacy, particularly Jefferson Davis. The Attorney General took the position that military officers were protected by the terms of their surrender until such time as the insurrection was declared to be at an end, after which they might be brought to trial. The Senate, eager for action in the case of Davis, called on the President to learn why none had been taken. The Attorney General prepared an opinion giving reasons. He believed that trials for high treason could not be had before a military court but must be held before civil courts. Moreover, the trials must be held in the localities in which the crimes were committed. Indeed, the courts before which Davis and other insurgents must be tried were not yet open."<sup>46</sup>

Indictments were eventually secured against Davis, but the matter dragged along. William M. Evarts and Richard Henry Dana were employed as counsel for the government. Then Evarts was made Attorney General. Finally, in 1868, Dana advised against prosecution. Evarts agreed. They thought it unwise to submit to a jury in Richmond the questions concerning treason and rebellion upon which the case would turn. "As it is one of the great facts of history that he was its head, civil and military, why should we desire

<sup>44</sup> Warren, *Supreme Court, op. cit.*, III, 142-143, 152-153, 166-167.

<sup>45</sup> Speed to Price, Mar. 22, 1865, Letter Bk. D, 213; Speed to Grover, Sept. 20, 1865, Letter Bk. E, 220; Speed to Harrison, Mar. 19, 1866, *id.*, 436; Speed to Bristow, May 31, 1866, Letter Bk. F, 41.

<sup>46</sup> Ashton to Harrison, June 9, 1865, Letter Bk. D, 371; 11 Op. 411.

to make a question of it and refer its decision to a jury, with power to find in the negative or affirmative, or to disagree?" It would require only one dissenting juror to give Davis and his followers a triumph. "The risks of such absurd and discreditable issues of a great State trial are assumed for the sake of a verdict which, if obtained, will settle nothing in law or national practice not now settled, and nothing in fact not now history." Moreover, to inflict a minor punishment would degrade the government, whereas at this time the people would not favor a sentence of death."

President Johnson on Christmas Day, 1868, pardoned all who had participated in the Confederacy. The indictments against Davis were dismissed, and after two years' imprisonment and nineteen months on bail he was finally discharged. His insistent requests for the vindication of a trial were ignored. The case in this respect resembled hundreds of other cases. In spite of wholesale indictments in a number of localities, it is said that no sentence of death or of fine and imprisonment was carried out in any judicial prosecution arising out of the rebellion.<sup>47</sup> The explanation lies in part in the trial of offenders by military tribunals and the imprisonment of troublesome persons without resorting to trials of any kind. Indictments in the usual course of civil justice may have served some purpose by way of intimidation. Further than that little was achieved by the furor of activity of district attorneys and grand juries.

The post-war history of confiscation was similar to that of the treason cases. Friction with the War Department remained. As a means of coercion, property continued to be seized and new cases were instituted immediately after the end of hostilities, but orders were issued not to carry the proceedings to conclusion. In many places in the South there were no courts, no district attorneys, no marshals. The military and treasury agents had their way. Until all subordination of the judicial power to the military was removed, the Supreme Court justices refused to perform circuit court duty in the South. Speed regarded confiscation measures as effective weapons against unrepentant newspapers. "If upon inquiry, the facts will

<sup>47</sup> Evarts to Johnson, Oct. 9, 1868, Letter Bk. G, 270; Dana to Evarts, Aug. 24, 1868, A. G. Ms.; Dyer, *Public Career of William M. Evarts* (1933), 107.

<sup>48</sup> Randall, *Constitutional Problems Under Lincoln* (1926), 91, 116; 15 Stat. 711.

justify it," he wrote District Attorney Chandler, "you will seize and confiscate the property of the Editors and Proprietors of the Richmond Whig and the Lynchburg Virginian. I had hoped that Virginians had suffered enough; it seems that a few have not. They have suffered in an effort to destroy the Government. That suffering was voluntary. Now they must be taught that the Government and law are stronger than they are." <sup>40</sup>

Many Southerners found protection by taking the oath of amnesty or by securing special pardons from the President. "The pardon forgives the offense," wrote Speed. "The offense being forgiven, there remains nothing to sustain the judgment, and no further execution of it can be had." In the latter part of 1865 letters began to go out directing that no further seizures of property be made. "I am instructed by the President," Speed wrote early in the following year, "to say to you that it is not the wish and purpose of the Government to persecute by confiscation persons who are obedient to the law, or promise to be so in good faith in the future; but persons known to you to be contumacious and still cherishing rebellious feelings, may be regarded as exceptions to this rule." When the rebellion had been officially declared at an end, Speed thought that legitimate seizures could no longer be made under the confiscation acts, and instructions were given to dismiss pending cases. The proclamation of universal amnesty and pardon issued Christmas Day, 1868, made final end to prosecutions of this kind. <sup>41</sup>

For thirty years or more after the close of the war the Court of Claims was busy with the aftermath of confiscation under the Captured and Abandoned Property Act, since claimants were permitted to bring suits and recover their property or its value if they were able to demonstrate their loyalty to the Union. Large quantities of Confederate archives, accumulated at Washington, were used by the Department of Justice in defending the cases, to show that claimants now protesting loyalty had been secessionists during the period of

<sup>40</sup> Ashton to Grover, April 22, 1865, Letter Bk. D, 268; Ashton to Cogswell, May 5, 1865, *id.*, 288; Speed to Chandler, July 15, 1865, Letter Bk. E, 106; Hatch to Bares, May 2, 1864, A. G. Ms.; Perry to Johnson, Dec. 2, 1865, *ibid.*; Call to Seward, Mar. 5, 1866, *ibid.*; Arnold to Speed, April 10, 1866, *ibid.*

<sup>41</sup> Speed to Jennings, May 17, 1866, Letter Bk. E, 532; Speed to Hall, Jan. 11, 1866, *id.*, 358; Speed to Phillips, June 25, 1866, Letter Bk. F, 77; Stanbery to Pike, Aug. 14, 1866, *id.*, 121.



the war."<sup>11</sup> It was one of the unfortunate results of the confiscation policy that it thus perpetuated sectional feeling long after hostilities had ended.

Far more significant, however, was the bitter factional struggle to determine the manner of restoring the southern states to the Union. In 1865 President Johnson appointed provisional governors, who were to encourage the calling of conventions to establish state governments. The delegates were to be persons loyal to the United States who had taken the oath of amnesty and were qualified voters under the state laws as they had stood at the time of secession, but the oath was withheld from high officers in the Confederate federal and state governments and persons of wealth or prominence."<sup>12</sup> The voting qualifications prevailing before the war excluded Negroes; and it was not until December 18, 1865, when the restoration of state governments under the President's plan was well along, that the Thirteenth Amendment was adopted assuring that the status of slavery had been abolished. There existed as yet no specific guarantee of political or civil rights for the former slaves.

In August 1866, the President proclaimed the restoration of peace and civil authority throughout the United States. In all histories of the period, however, the story is told of the dissatisfaction of leaders in Congress with the leniency shown and of fear that the newly emancipated Negroes would be reenslaved by their former masters. A bill was passed to extend the life of the military bureau in the War Department, to care for the new freedmen. The President vetoed this extension of military power into peacetime activities, but the bill passed over his veto."<sup>13</sup>

Bates had seen the rise of an extreme faction whose "shrewdest policy" was to abandon their separate organization and align themselves with Lincoln in a new party during his second campaign for the Presidency. "I think Mr. Lincoln could have been elected without them and in spite of them," he had written in his diary. "In that event, the Country might have been governed, free from their *malign*

<sup>11</sup> Ann. Rep. Atty. Gen. 1891, 25-26.

<sup>12</sup> See, for example, the proclamation for North Carolina, 13 Stat. 760, May 29, 1865; oath of amnesty, 13 Stat. 758, May 29, 1865.

<sup>13</sup> 14 Stat. 814, Aug. 20, 1866; *id.*, 173, July 16, 1866.

*influences."* Now from the pen of Speed came predictions of things to come. "Troubles and difficulties that I did not anticipate are upon us," he wrote. "A storm of acrimony and bitterness seems to be brewing." <sup>84</sup>

Congress postponed the admission of representatives from the southern states while it scrutinized the process of reconstruction. To insure protection to the liberated slaves, it passed a civil rights act defining United States citizenship to include the freedmen and providing that they should have equal rights with others in holding property and equal privileges in the courts. President Johnson vetoed the bill, questioning the fitness for citizenship of four million people newly emerged from slavery and criticizing the broad interference with the jurisdiction of the states.

"The white race and the black race of the South have hitherto lived together under the relation of master and slave—capital owning labor. Now suddenly that relationship is changed," he explained. "They stand now each master of itself. In this new relation, one being necessary to the other, there will be a new adjustment, which both are deeply interested in making harmonious. Each has equal power in settling the terms, and if left to the laws that regulate capital and labor it is confidently believed that they will satisfactorily work out the problem."

"This bill frustrates this adjustment," he concluded. "The tendency of the bill must be to resuscitate the spirit of rebellion and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace." Congress passed the bill over his veto, and, lest such legislation be held unconstitutional, proposed to the states the Fourteenth Amendment which included citizenship and other provisions similar to those of the act. <sup>85</sup>

The southern states refused to ratify the Fourteenth Amendment. Congress returned to activity in December 1866, ready to assert its dominance in no uncertain terms. The President showed no signs of yielding. Speed had resigned and was replaced by Henry Stanbery, a Cincinnati lawyer who was wholeheartedly with the Presi-

<sup>84</sup> *Bates Diary, op. cit.*, 412-413; Speed, *op. cit.*, 84.

<sup>85</sup> Richardson, *op. cit.*, VI, 405 *et seq.*; 14 Stat. 27, April 9, 1866.

dent. One of the first important measures enacted by Congress provided for Negro suffrage in the District of Columbia and excluded persons who had in any way aided the rebellion. Stanbery was opposed to Negro suffrage and gave support to the President's veto message. Congress passed the bill over the veto."

Far more serious was a measure entitled "An Act to provide for the more efficient Government of the Rebel States." Its preamble assumed that no legal state governments or adequate protection for life and property existed in ten southern states. The area was to be divided into five districts, each governed by a military officer who might rely on local civil tribunals for judicial purposes, or create military tribunals. Senators and Representatives should be admitted to Congress from the several states after they had formed constitutions acceptable to Congress and had adopted the Fourteenth Amendment. Delegates to the constitutional conventions were to be elected by all male citizens of the state of twenty-one years of age or over, without reference to race, color, or previous condition of servitude, but with the exclusion of persons disfranchised by the proposed Fourteenth Amendment for participation in the rebellion.

Stanbery and former Attorney General Jeremiah S. Black drafted the veto message which denounced the bill as military despotism and unconstitutional. It was immediately passed over the veto. The tenure of office bill, which was calculated to prevent presidential dismissal of Stanton and others more in agreement with Congress than with the President, followed the same course. Three weeks after the first military reconstruction act became law, Congress adopted a supplemental measure. Like its predecessor it met with a veto, and again like its predecessor it was passed over the veto."

In spite of the precision with which Congress attempted to determine procedure, there were naturally a number of questions of interpretation left open for controversy in the cabinet. Stanbery

<sup>80</sup> *Welles Diary*, *op. cit.*, III, 3-6; Richardson, *op. cit.*, VI, 472 *et seq.*; 14 Stat. 375, Jan. 8, 1867. Henry Stanbery (1803-1881) was born in New York City, began to practice law in Lancaster, Ohio, became attorney general of Ohio, served as a member of the state constitutional convention in 1850, practiced in Columbus, moved to Cincinnati, and was then appointed Attorney General of the United States (1866-1868). Thereafter he returned to practice in Cincinnati. *Dict. Am. Biog.*, XVII, 498.

<sup>81</sup> 14 Stat. 428, Mar. 2, 1867; *id.*, 430, Mar. 2, 1867; 15 Stat. 2, Mar. 23, 1867; *Welles Diary*, *op. cit.*, 51-52, 54; Richardson, *op. cit.*, VI, 492, 498, 531.

drafted two opinions in which he broadened the base of suffrage to include former rebels whom Congress in passing the act intended to exclude. The opinions were discussed at length in cabinet meetings. Only Secretary of War Stanton, under whose jurisdiction military reconstruction was to be carried out, offered strenuous objections. The opinions were denounced in Congress as the work of a man who had at first tried to defeat the legislation by veto and then, having failed, sought to achieve the same end by emasculating interpretation. Congress adopted another measure to declare "the true intent and meaning" of the earlier laws. Johnson disapproved the bill, and Congress passed it over the veto, thereby defeating the purpose of the Stanbery opinions."

Failing to curb the will of Congress by other methods, the opposition sought restraint through the Supreme Court on the ground that the reconstruction acts were unconstitutional. The sympathies of the Court in these matters were in doubt. Although a majority of the justices had been appointed by President Lincoln, they had pronounced trials by military tribunals outside the war zone illegal where the civil courts were open. The case might well be taken as precedent for a decision against the constitutionality of the military reconstruction acts."

A statute enacted near the close of the war provided that no person should be counsel in any federal court unless he had taken the test oath of July 2, 1862, to the effect that he had not in any way participated in rebellion against the United States. Augustus H. Garland, who years later was to be Attorney General of the United States, had been a member of the Confederate Congress. After receiving a pardon from the President, he petitioned for permission to resume his practice before the Supreme Court, without taking the oath, on the grounds that the test oath act was unconstitutional and that in any event he had been pardoned by the President. His petition was granted by the narrow margin of five to four. The majority

" 12 Op 141, *id* 182, Gorham, *Life and Public Services of Edwin M. Stanton* (1899) II, 360-371, *Welles Diary*, *op cit* III, 60, 63, 94-99, Cong Globe, 40 Cong 1 Sess, 579-580 626-627, App 6-8, Richardson, *op cit*, VI, 536 *et seq*, 15 Stat 14 July 19, 1867

" *Ex parte Milligan*, *supra*

agreed that the act was invalid as a bill of attainder in excluding Garland from the future practice of his profession and as an *ex post facto* law in imposing punishment for some acts which when committed were not unlawful and imposing a new form of punishment for the others. They also agreed that his pardon "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." "

The attack on military reconstruction came when William L. Sharkey, the provisional governor of Mississippi, and Robert J. Walker, with Garland on the brief, sought from the Supreme Court in the name of the State of Mississippi an injunction to prevent the President and the military commander from enforcing the acts. Stanbery appeared for the United States, not to defend the reconstruction acts but to argue that the petition should not be received. The Court agreed with him. A proceeding against the President was without precedent. "This court," concluded Chief Justice Chase, "has no jurisdiction of a bill to enjoin the President in the performance of his official duties, and no such bill ought to be received by us." "

Another action was immediately instituted in an attempt to get the reconstruction acts before the Court, the suit being directed this time not at the President but at Stanton as Secretary of War, General Grant as commander of the army, and Major Pope in charge of the military district involved. Stanbery defended for the government, again not discussing the constitutionality of the reconstruction acts but contending that the major question raised was political rather than judicial and hence not subject to decision by the Court. "A controversy that raged a few weeks ago in Congress is brought here to be settled," exclaimed Stanbery. "If there is a power in this court to veto laws which the Congress considers wholesome and necessary, such a power has never before been invoked." The Court dismissed the petition for "want of jurisdiction." "

While illiterate Negroes, poor whites, and "carpetbag" politi-

" 13 Stat. 424, Jan. 24, 1865; *Ex parte Garland*, 4 Wall. 333 (1866).

" *Mississippi v. Johnson*, 4 Wall. 475 (1866).

" *Georgia v. Stanton*, 6 Wall. 50 (1867); see Bates to Stanbery, Aug. 3, 1867, A. G. Ms.

cians from the North were meeting in conventions to draft constitutions for the southern states, another case came to the Supreme Court which promised to raise the question of the constitutionality of the reconstruction acts. McCardle, a southern editor, arrested and held for trial before a military commission, petitioned for a writ of habeas corpus in a federal circuit court. When the petition was denied, he appealed to the Supreme Court under recent legislation prescribing procedure and authorizing such appeals. When it appeared that the constitutional question would not be avoided in this case, Stanbery announced to the Court that, because he had given the President an opinion adverse to the constitutionality of these acts, he could not appear for the government. While Congress was busy denouncing an Attorney General who refused to defend government cases and also refused to resign, arrangements were made to employ special counsel.\*\*

When the Court refused to dismiss the case, Congress awoke to the possibility of a disastrous decision and set about to withdraw the jurisdiction of the Supreme Court. Meanwhile the case was argued, but the Court did not decide it until the jurisdictional law was passed and repassed over the President's veto. The case was then set for argument the next year and finally dismissed for want of jurisdiction.\*\*

Meanwhile, the impeachment trial of the President climaxed the struggle between Congress and the Chief Executive. Stanbery, deeply loyal to Johnson, was determined to aid in his defense. To prevent public duties from interfering with his handling of the case and also to avoid criticism, he resigned as Attorney General.\*\* Secretary of the Interior Browning temporarily took over the duties of the Attorney General's office. Stanbery and his co-counsel were successful in their defense of the President, but when Stanbery's name was again presented to the Senate that body took revenge by refusing to confirm his reappointment as Attorney General.

\*\* Cong Globe, 40 Cong 2 Sess, 981-984, 991-992, 14 Stat 385, Feb. 5, 1867

\*\* *Ex parte McCardle*, 6 Wall 318 (1868), 7 Wall 506 (1869); 15 Stat 44, Mar 27, 1868, Warren, *op cit*, III, 187-206, 209-210, Swisher, *Stephen J. Field* (1930), 159-162

\*\* *Welles Diary*, *op cit*, III, 308.

Indeed, Congress had already taken other vengeance on the Attorney General's office. When litigation in the *Court of Claims* was brought under the control of the Attorney General, an office of Assistant Attorney General was created to handle the extra work. Instead of making the arrangement in this simple fashion, however, the existing office of Assistant Attorney General was abolished and two new ones were created, thereby ousting John M. Binckley who had aligned himself with the President in the factional struggle. "This disposes of the notorious Binckley," gloated the *New York Tribune*, "the incumbent Assistant Attorney General, whose opinions a year ago afforded so much amusement to the country." \*\*

Johnson appointed William M. Evarts, a prominent New York lawyer who had appeared before the Supreme Court for the government in the *Prize* and other cases. Evarts had also defended Johnson at the impeachment trial, but he had not become so obnoxious to the Radicals in Congress as his predecessor. He served for less than eight months, continued a heavy private practice, and left much of the work of his office to his subordinates. Secretary Welles generalized his intense dislike for Evarts, in terms of the whole legal profession. "It is unfortunate for the country that there is such a preponderance of lawyers in our public councils," he wrote in his famous diary. "Their technical training and extensive, absorbing practice unfit them to be statesmen." \*\*

In order to raise money for the conduct of the war it had been necessary to issue United States notes, commonly known as "greenbacks," for the redemption of which no provision was made. Post-war opposition to currency contraction prevented the withdrawal of the notes, whereupon certain hostile interests challenged their use on constitutional grounds. A private case, *Hepburn v. Griswold*, which

\*\* 15 Stat. 75, June 25, 1868; *New York Tribune*, June 19, 1868, see the opinions written by Binckley, 12 Op. 222-235.

\*\* *Id.*, 451-452, 463, 480-481. William Maxwell Evarts (1818-1901) was born in Boston, began the practice of law in New York, was assistant United States attorney, argued important prize cases and other cases during the Civil War, visited England on a mission for the United States, served in the New York constitutional convention in 1867, and was appointed Attorney General of the United States (1868) to fill out a term of less than a year. He was Secretary of State from 1877 to 1881, represented the United States at the Paris monetary conference in 1881, and became a United States Senator in 1885. See Dyer, *Public Career of William M. Evarts* (1933), and Dict. Am. Biog., VI, 215.

raised the issue was presented to the Supreme Court at the December term 1867. Before it was decided, the Attorney General suggested that because of the public importance of the case it be reargued, with leave to the government to be represented. The Court agreed and accordingly the next year Attorney General Evarts appeared for the United States to defend the legal tender acts.

Decision was postponed for another year. General Grant became President, and named Ebenezer Rockwood Hoar of Massachusetts to be his Attorney General. On the day the Court read its decision holding the legal tender acts unconstitutional, the President sent to the Senate nominations for two associate justices. Since the Court had divided four to three, the new justices might change the result should another case be brought. It was charged that Grant and Hoar had "packed" the Court. After much procedural maneuvering, violent comment in the press, and surly conduct in the courtroom, two cases were presented. By a five to four decision the opinion of the year before was reversed in the *Legal Tender Cases*. "It is no unprecedented thing in courts of last resort," said Justice Strong, "to overrule decisions previously made." \*\*

The perplexities of peace were upon the reconstituted nation. Eyes of kindness and of sympathy, of suspicion and of hatred, turned toward the South. "The courage and steady purpose of this people have been tried and proved on a thousand battlefields; now their fidelity to truth and justice must be tried and proved." So Lincoln's friend, Attorney General Speed, had written to his mother. "This is a contest of a much higher order." \*\*

\*\* *Hepburn v. Griswold*, 8 Wall. 603 (1870); *Latham v. U. S.*, 9 Wall. 145 (1870); *Legal Tender Cases*, 11 Wall. 682, 12 Wall. 457 (1871). See Warren, *Supreme Court*, op. cit., III, Ch. 31; Swisher, *Field*, op. cit., 166 et seq.; Hoar, *The Charge of Packing the Court against President Grant and Attorney General Hoar Refused* (1895); Ratner, *Was the Supreme Court Packed by President Grant?*, Pol. Sci. Q., Sept., 1935.

\*\* Speed, op. cit., 86 and see 58-61, 67, 74.



## CHAPTER XI

### A DEPARTMENT OF JUSTICE

THE nation turned from civil war to find itself possessed of a great variety of legal problems and a multitude of law officers and agencies. The scattered district attorneys, whom the Judiciary Act of 1789 had made responsible for both criminal and civil litigation in the district and circuit courts, remained all but completely independent.<sup>1</sup> Occasionally their general authority had been restated in particular statutes, and special legal and administrative duties had been imposed from time to time. The same was true of the marshals.

President Pierce had attempted to route departmental law business through the Attorney General, but even then, when called upon, the Attorney General acted merely as an adviser. Black, who succeeded Cushing, believed it wrong to "interfere" with the management of cases in the trial courts and repeatedly refused requests, though he acknowledged a "sort of supervisory power" over the general subject. Attorney General Bates denied himself all authority or responsibility for such cases.<sup>2</sup>

These imperfect arrangements could not survive a national crisis. In the opening days of the Civil War, circumstances moved Bates to renew Randolph's recommendation of seventy years earlier that the supervision of district attorneys be made a responsibility of the Attorney General. The Senate Judiciary Committee promptly reported a bill giving the Attorney General direction over these attorneys and the marshals and empowering him to employ special counsel to assist them. The Senate agreed without argument.

In the House an old theme reappeared. This was the erection of

<sup>1</sup> Wirt, *Attorney General and District Attorneys* (1823), 1 Op. 608, 611; Taney, *The Jewels of the Princess of Orange* (1831), 2 Op. 482, 491-492; Cushing, *Office and Duties of the Attorney General* (1854), 6 Op. 326, 335-336, 347-348.

<sup>2</sup> Cushing, *Government Suits* (1853), 8 Op. 463, and *Duties of the Attorney General* (1863), 7 Op. 576, 577; Black to U. S. Atty., Los Angeles, Nov. 16, 1860, Letter Bk. B-2, 594; Bates to Dist. Atty., Sol. Treas., and P. M. G., May 4 and 8, 1861, *id.*, 717, 720.

a separate department with the Attorney General placed upon equal footing with other departments, a step which Congress had hitherto uniformly refused to take and one which would deprive the Solicitor of the Treasury of all "ability" to discharge his duties. Nevertheless, the House approved the bill without much ado.

On the day it was signed by the President another measure was introduced to assure that the new statute would not be construed to affect the duties of the Solicitor of the Treasury, on which both the Attorney General and the Secretary of the Treasury already had agreed. But later the Supreme Court took occasion to define the status of these two law officers, in an opinion by Justice Clifford who had once served as Attorney General. Civil suits, whether tested by statutes, usage, or decision, said the opinion despite the practice of thirty years or more, "so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney General."<sup>6</sup>

However, the situation was not greatly changed nor departmental relations improved. Only in cases of "peculiar" importance did the Attorney General have time to advise district attorneys, although he was at first solicitous to point out that now supervision was formally lodged in his office.<sup>4</sup> They, on the other hand, were at a loss whether to report to the Treasury or to the Attorney General. Other cabinet officers continued to give directions, a practice to which Bates promptly objected and, as he noted in his diary, "*without consulting anyone*, gave instructions flatly to the contrary."<sup>5</sup>

While the Attorney General exercised some influence in the appointment of district attorneys,<sup>6</sup> other matters slipped from his office. Though he acknowledged that he was responsible "in some sort" for the official acts of local federal law officers, he did not regard himself as empowered to discipline misconduct.<sup>7</sup> Most civil

<sup>6</sup> 12 Stat. 285 and 327, Aug. 2 and 6, 1861; Cong. Globe, 37 Cong. 1 Sess., 62, 134, 365-366, 381, 426-427, 441, 446, 454; *Confiscation Cases*, 7 Wall. 454, 456, 457, 458-459 (1868).

<sup>4</sup> See Letter Bks. B-4, 160, 166; B-5, 34, 45; C, 130, 624, 660, 672, 673; E, 76, 457; G, 108; Instr. Bk. A-1, 555.

<sup>5</sup> See Letter Bks. B-4, 149, 155; B-5, 184; C, 244; *Diary of Edward Bates* (Beale ed. 1933), 293; *Diary of Gideon Welles* (1911), I, 290, 301; II, 205; III, 208-211.

<sup>6</sup> See Letter Bks. B-5, 62; C-5, 301; H, 184. *Welles Diary*, *op. cit.*, I, 56-57.

<sup>7</sup> See Jud. Letter Bk. 8, Dept. Int., 325; Letter Bk. C, 450; Letter Bk. E, 256.

matters could be referred to the Solicitor of the Treasury;<sup>9</sup> and the Secretary of the Interior, so the Attorney General himself ruled, retained authority over accounts and the appointment of deputies and substitutes.<sup>10</sup>

Whatever may have been the intention, the Attorney General still maintained a very modest office on a slender budget.<sup>11</sup> Not only had the district attorneys and marshals to get along without his advice, but they were referred to other departments for instructions; questions for opinion were returned to departments unanswered, and cases in the Supreme Court were submitted without argument so far as possible. The small staff, to which Congress added some clerks, was housed first in one department then in another.<sup>12</sup>

As the war came to a close and reconstruction began, the legal business of the government increased. In April 1866, James Speed, who had been Attorney General less than a year and a half, had written nearly as many opinions as his predecessor had written during three years. For many months the employees in his office had worked more than double the official number of hours, and Sundays and holidays were unknown to them.<sup>13</sup>

The calendars of the federal courts were loaded with old treason, confiscation, and revenue cases. The State, War, and Treasury Departments paid substantial sums for the services of special counsel in cases arising within their several jurisdictions. The Solicitor of the Court of Claims and his subordinates were responsible for large numbers of suits against the United States arising out of the war. The district attorneys were faced with novel proceedings affecting the legality of the action of the government during that period. "And in these cases," reported the Attorney General to the chairman of a con-

<sup>9</sup> See Letter Bks E, 146, 321, 454, 529, G 173, 284.

<sup>10</sup> Atty Gen to Sec Int, Oct 9, 1861, Letter Bk B 4, 163, Asst A G to U S Atty, Feb 11, 1863, Letter Bk B 5, 367, Asst Sec Int to A G, May 11, 1863, Jud Letter Bk 8, Dept Int, 323.

<sup>11</sup> Cong Globe, 38 Cong 2 Sess, 996, 1008, 1125, 1297, 40 Cong 2 Sess, 3511-3512, *id*, 3 Sess, 115, 231. See Letter Bks E, 167, F, 274, G, 13, 107, 337, Instr Bk No 1, 524.

<sup>12</sup> See Instr Bk A-1, 33, Letter Bk D 237, Letter Bk B 2, 693, Letter Bk B 5, 4, Letter Bk F, 232, *Bates Diary, op cit*, 177, 204-205, 361-362, Cong Globe, 38 Cong 2 Sess, 1151, 1267, 13 Stat 516, Mar 3, 1865, 14 Stat 191, 207, July 23, 1866.

<sup>13</sup> Speed to Fessenden, April 7, 1866, Letter Bk E, 472-475, Speed to Stevens, April 13, 1866, Cong Globe, 39 Cong 1 Sess, 4030.

gressional commission on economy, "the District Attorney has been compelled to encounter the largest and ablest array of counsel which private interest could procure." <sup>22</sup>

The several departments, moreover, requested and secured the creation of their own law officers—the Solicitor and Naval Judge Advocate General, Solicitor for the War Department, Post Office Solicitor, Solicitor for the State Department, an Assistant Solicitor for the Treasury, a Solicitor of Internal Revenue. The houses of Congress were told that it was "utterly impossible" for the Attorney General to care for the work of the whole government, and if these offices were not created the departments would be driven to the expensive course of employing more special counsel.

Senator Trumbull of Illinois resisted. "I do not believe it is in harmony with the organization of our system of Government to have an Attorney General's office—for that is what it amounts to—in each Department of Government," said he. "If that is to be done, I think we might as well abolish the Attorney General's Department." Senator Saulsbury of Delaware agreed on another ground. "The law was better expounded when the Departments had no Solicitors than it has been since; and if the law is to be murdered by any new Solicitors of Departments, as it has already been murdered by existing Solicitors, I think we had better have no more." No, Senator Davis of Kentucky said, it was the Attorney General and his assistant "with a large array of clerks" who were incompetent.

The next year, when a Solicitor for the Department of State was proposed, Senator Trumbull returned to the attack. The Attorney General's office should be an independent department, charged with the construction of laws for all the departments to secure uniformity and eliminate "difficulty, expense and uncertainty." But Senator Sumner of Massachusetts made a distinction. It was all very well to submit "great questions of law" in solemn form to the highest law officer of the government, but daily current business of a routine clerical or administrative character, a class of matters numbered by hundreds every day, must be handled in the departments by men who

<sup>22</sup> *Dist. Attys.*: Cong. Globe, 36 Cong. 2 Sess., 1429-1431; 37 Cong. 2 Sess., 1297-1298, 1567-1568, 1582, 1583, 2565-2568, 2587-2588; Bates to Comm. on Comp. and Expenditures, Jan. 17, 1862, Letter Bk. B-4, 258.

were necessarily trained in the law but who did not undertake to perform the high duties of the Attorney General. So it was in England, and the simple organization of the last sixty years was no longer adequate in the United States. All very well, said former Attorney General, now Senator, Johnson—but they should be attached to the Attorney General's office. 'Where is the difference?' replied Senator Fessenden of Maine.<sup>14</sup> The departments were granted their solicitors.

Preparations for reform were begun in December 1867. When a bill to provide for appeals from the Court of Claims was introduced, the Judiciary Committee immediately began a comprehensive study of the conduct of claims cases and of possibilities for more direct coordination and control of litigation and legal advice in the government, with economy as one of the predominant motives. On December 16 Chairman Trumbull secured adoption of a resolution requesting information from the Attorney General: 'What amounts had been spent for assistance in Supreme Court cases and for assistance to the district attorneys? Was the force in the Attorney General's office sufficient? Could not the solicitors and law clerks in the various departments and in the Court of Claims be dispensed with and their duties discharged under the direction of the Attorney General' so as to bring all the law officers of the Government under one head, with saving of expense and benefit to the public service?'<sup>15</sup> Attorney General Stanbery was now faced with the same questions which drew from Cushing his brilliant essay thirteen years before.

'As to the mere administrative business of the office, the present force is sufficient,' Stanbery replied, but as to the proper duties of the Attorney General, especially in the preparation and argument of cases before the Supreme Court of the United States and the preparation of opinions on questions of law referred to him some provision is absolutely necessary to enable him properly to discharge his duties. After much reflection, it seems to me that this want may best be supplied by the appointment of a Solicitor General. With such an assistant, the necessity of appointing special counsel in the argument of

<sup>14</sup> Cong. Globe 38 Cong. 2 Sess. 1086-1088, 1337, 39 Cong. 1 Sess. 2127-2128, 2640-2643, 2645, 40 Cong. 2 Sess., 1132, 1133, 3474-3475, 3772-3778.

<sup>15</sup> *Id.*, 196.

cases in the Supreme Court of the United States, would be, in a great measure, if not altogether dispensed with." Stanbery added briefly that in his opinion the various law officers now attached to the other departments and the Court of Claims might, with advantage to the public service, be transferred to the Attorney General's office "so that it may be made the Law Department of the Government, and thereby secure uniformity of decision, of superintendence, and of official responsibility."<sup>10</sup>

The Senate Judiciary Committee kept the subject under advisement. The House of Representatives was considering it at the same time. Indeed, before the Senate had requested information, William Lawrence of the House Judiciary Committee had secured adoption of a resolution directing the committee to inquire into the expediency of providing that solicitors and other law officers should all constitute a part of the Attorney General's "department"; and he had written Stanbery, asking to be furnished with the draft of a bill.<sup>11</sup>

Representative Jenckes of Rhode Island next introduced a measure to establish a "department of justice." It was referred not to the Judiciary Committee but to the Committee on Retrenchment, which was a joint committee of the two houses to find ways of reducing government expenditures. Three separate committees were now seeking a closer integration of the legal business of the government.<sup>12</sup> Lawrence reported and explained a bill to establish a law department. Little or nothing was heard of either of the House bills from February until May—the period of the impeachment trial of the President. Then other matters pressed for attention.

Meanwhile government litigation in the Court of Claims was placed in the hands of the Attorney General. Two Assistant Attorneys General, together with a clerical staff, were provided. The subject was not new to the Judiciary Committee. Indeed, the House had approved such a measure the year before.<sup>13</sup>

<sup>10</sup> Stanbery to the Senate, Dec. 20, 1867, Letter Bk. G, 13-15.

<sup>11</sup> Cong. Globe, 40 Cong. 2 Sess., 153, Lawrence to Stanbery, Dec. 16, 1867, A. G. Ms.

<sup>12</sup> Cong. Globe, 40 Cong. 2 Sess. 934, House Jr. Feb. 11, 1868, 335-336, Cong. Globe, 40 Cong. 2 Sess., 1116-1117, 1271-1273, 1633, 1860, 2480, 41 Cong. 2 Sess., 3035; Stanbery to Colfax, Feb. 28, 1868, Letter Bk. G, 92.

<sup>13</sup> 15 Stat. 75, June 25, 1868, Cong. Globe, 40 Cong. 1 Sess., 186, 367-368, 381, and see 831; *id.*, 2 Sess., 153, 1116, 2764-2768, 41 Cong. 1 Sess., 680, 771.

Opponents had stressed the fact that this bill, nominally to care for appeals from the Court of Claims, would provide part of a program for bringing the legal business together under one head and that an Assistant Attorney General and three officers of the Court of Claims would be displaced to leave three vacancies in the midst of the controversy between the President and Congress. "It appeared to us," replied Senator Edmunds of Vermont, "that the office of Attorney General was the true office to which should be committed the law interests of the United States."

During the following session, the New York *Tribune* announced that the House Judiciary Committee would report Lawrence's bill to establish a law department, which would reduce the expenses of the government by more than \$100,000 a year. Instead, the Attorney General was directed to report to the House possible reductions in the personnel and salaries. He replied that he could recommend none that would be consistent with the interests of the public service. The Lawrence bill made no headway, and as a retrenchment measure the authority of the Attorney General to employ special counsel to aid district attorneys was repealed.<sup>80</sup>

This hasty action proved disastrous, particularly in the larger cities. A bill to restore the power to appoint special assistants was introduced early in the special session at the beginning of the Grant administration. The House approved. In the Senate, Trumbull declared it absolutely necessary. It passed over spirited opposition and was the only measure receiving serious consideration, although Lawrence, Jenckes, and Julian introduced bills to establish a law department, a department of justice, and a home department to provide for the enforcement of civil law in the Indian country.<sup>81</sup>

At the next session, on February 25, 1870, Jenckes reported from the Committee on Retrenchment a bill to establish "a department of justice," which for the most part embodied the ideas of both Lawrence and Jenckes. Lawrence gave it his support. He disagreed only on minor items, one of which was the title of the new department. The bill did not divide the proposed department into bureaus as the

<sup>80</sup> New York *Tribune*, Dec. 12, 1868, Evans to Colfax, Jan. 9, 1869, Letter Bk. G, 337; 15 Stat. 294, Mar. 3, 1869.

<sup>81</sup> Cong. Globe, 41 Cong. 1 Sess., 505, 630-631, 716-717.

Lawrence bill had done. This was a concession to the desires of the Attorney General.

The debate again made much of the multiplicity of conflicting legal opinions given by the law officers in the several departments and of expenditures for special counsel, including large retainers paid eminent lawyers who at times rendered little service in return. "We propose to create," declared Jenckes, "a new officer, to be called the solicitor general of the United States, part of whose duty it shall be to try these cases in whatever courts they may arise. We propose to have a man of sufficient learning, ability and experience that he can be sent to New Orleans or to New York, or into any court wherever the Government has any interest in litigation, and there present the case of the United States as it should be presented."

House opposition was largely perfunctory. Debate in the Senate was brief and without significance, except for Senator Bayard's pungent statement that the object of the bill was the prevention of "the sporadic system of paying fees to persons, not to speak disrespectfully of them, who may be called departmental favorites." The bill was signed by President Grant on June 22 and the Department of Justice came into formal existence on July 1, 1870. A brief news item stated that the President's approval had caused a "great flutter" among employees of the offices to be transferred to the new department."

The act establishing the Department of Justice required the Attorney General and his assistants to render all services requiring the skill of persons learned in the law necessary to enable the President, departments, and bureaus to discharge their respective duties. Under the Attorney General, as head of the Department of Justice, was placed the supervision of the district attorneys and all other law officers of the government. To him was transferred from the Interior Department the supervision of the accounts of district attorneys, marshals, and clerks of court. He was to be aided by a Solicitor General—the title of one of the great law officers of England since the fifteenth century—and by "Assistants to the Attorney General."

<sup>22</sup> *Id.*, 2 Sess., 1568, 3034-3039, 3061, 3065-3067, 4490; 16 Stat. 162; New York *Tribune*, June 24, 1870.



He was to report to Congress annually as Cushing had recommended sixteen years before. He was authorized to make all necessary rules and regulations for the new department and for the management and distribution of its business.\*\*

These powers were sweeping. In addition, the former duties of the Attorney General were carried with him into the newly created department. Thereafter legislation occasionally restated or detailed the functions of the officers of the department with reference to particular subjects—such as special classes of claims by or against the United States; the public lands; internal revenue and customs; the criminal law and civil regulations; regulations of trade, commerce, and transportation; Indians; shipping; rivers and harbors; the mails; immigration and naturalization; power resources; legislative investigations; the defense, dismissal, or supervision of public officers; the enforcement and protection of the rights and property of the United States; and other matters.

Administrative or executive duties as in the past were thereafter to be required of the Attorney General or the subordinate officers of the Department of Justice—the approval of public building plans, restoration of destroyed court records, the provision and supervision of courthouses, the promotion of the public health, the codification of statutes, the supervision of postal savings, the formulation of rules and regulations, membership on boards and commissions, and the like.

The early Attorneys General would have gasped at the broad and inclusive services required by the Department of Justice Act. The Civil War had brought political, economic, and social change. The flood of legislation presented new problems of the greatest delicacy and difficulty. Since Randolph, the Attorneys General had visualized a department. At the same time, the practice of other departments and the tradition of a modest law office presided over by a cabinet counsellor and Supreme Court barrister stubbornly resisted change.

Under normal circumstances the first Attorney General to head the new Department of Justice would have been Ebenezer Rockwood Hoar of Massachusetts, President Grant's first appointee to the office.

\*\* 16 Stat. 162, Secs. 1-18, June 22, 1870.

Hoar, however, had written opinions not popular with the Radicals, and he had failed to consult Senators about candidates for positions as district attorneys and judges. When Grant submitted his name for a Supreme Court vacancy, it was rejected. While the Department of Justice bill was in the last stages of enactment, Grant began negotiations for southern support for his Santo Domingo treaty and found it advisable to ask for Hoar's resignation in order to have a cabinet position for some person from the South.<sup>14</sup>

Amos T. Akerman of Georgia, a native of New Hampshire who had taken residence in the South in early life, was appointed. He had studied law in the office of John M. Berrien, Attorney General under Andrew Jackson, and had remained in private practice until the Civil War—an Old Line Whig, a man of limited means, and never converted to the point of view of the extreme southern leaders. He served for a time in the military forces of the Confederacy, but when the war was ended he aligned himself with the Republicans and served in the Georgia constitutional convention of 1868.

So vigorous was Akerman's support of the Republican cause and so ardent his praise of Grant that he was first rewarded with the position of United States district attorney in Georgia. Having served voluntarily in the military forces of the South, he was unable to take the test oath required of federal officers until Congress granted him special relief. He was firmly entrenched in the Republican regime but so unpopular with the dissenters among his fellow Georgians that he was at one time denied hotel accommodations when he appeared to conduct the trial of cases.<sup>15</sup>

These circumstances explain how it was that a man who had worn the Confederate gray could be chosen for a cabinet position as early

<sup>14</sup> See the *New York Tribune*, Dec. 20, 1869; Hesseltine, *Ulysses S. Grant, Politician* (1935), 209-210. Ebenezer Rockwood Hoar (1816-1895) was born at Concord, Massachusetts, graduated from Harvard Law School, was appointed judge of the state court of common pleas, became a judge of the supreme judicial court of Massachusetts, and resigned to accept the position of Attorney General of the United States (1869-1870). He later became a member of Congress. See Storey and Emerson, *Ebenezer Rockwood Hoar* (1911), and *Dict. Am. Biog.*, IX, 86.

<sup>15</sup> *New York Tribune*, Sept. 24, 1868, and June 21, 1870. Amos Tappan Akerman (1821-1880) was born at Portsmouth, New Hampshire, moved to Savannah, Georgia, where he studied law under former Attorney General John M. Berrien, served in the war on the side of the Confederacy, was a member of the Georgia constitutional convention of 1868, was United States district attorney, and was appointed Attorney General of the United States (1870-1871). *Dict. Am. Biog.*, I, 133.

as 1870. When Akerman arrived in Washington that summer, no facilities were available to house the staff in one place. The Attorney General and the clerks theretofore accommodated in the south wing of the Treasury building remained there. Solicitor General Benjamin H. Bristow of Kentucky and one Assistant Attorney General with their clerical force were assigned to rented quarters. The other Assistant Attorney General had his office in the basement of the Capitol. The next year all moved to three floors of the Freedman's Savings Bank building on Pennsylvania Avenue at Fifteenth Street. Here in crowded quarters the Department of Justice transacted its business until 1899. There was often no heat, and foul air from the sewer beneath the building was particularly offensive in hot weather.<sup>86</sup> The solicitors of the other departments, who had been transferred to the Department of Justice, remained in their former locations; and Walt Whitman, third-class clerk, continued to spend his evenings gazing over the Potomac from the office of the Solicitor of the Treasury.<sup>87</sup>

The Attorney General himself usually signed all correspondence, made the decisions in the details of litigation, approved accounts for the staff at Washington and the district attorneys and marshals, handled disciplinary matters, and argued some cases before the Supreme Court either alone or with the Solicitor General or Assistant Attorneys General. The Solicitor General never became a circuit rider in the lower courts, as the proponents of the Department of Justice Act had predicted. The law now permitted the Attorney General to assign opinions to other officers of the department, where constitutional questions were not involved. Even then, however, he was to approve such opinions. Attorneys General Akerman and Williams

<sup>86</sup> Ann. Reps. Atty. Gen. 1870, 1; 1871, 5; 1891, 24; Letter Bk. H, 583; Ex. and Cong. Letter Bk. No. 15, 550; Letter Bk. I, 117, 133, 262; Ex. and Cong. Letter Bk. B, 64; Letter Bk. I, 262; Letter Bk. K, 189; Letter Bk. S, 325, 365; Letter Bk. P, 43; Ex. and Cong. Letter Bk. K, 625. The Attorney General moved his office to Baltic Hotel in 1899, the library was placed in the old Corcoran Art Gallery, and then—a promised new building having failed to materialize—other quarters were leased until the present structure was provided in 1934. Cummings, *The New Home of the Department of Justice*, address at dedication of new building, Oct. 25, 1934.

<sup>87</sup> Solicitor of the Treasury Wilson recommended to the Attorney General that, since Congress had eliminated one third-class clerk, "Mr. Walt Whitman is the clerk of this class who can be discharged with least detriment to the public service." Letters of Jan. 9, 1871, June 22, 30, and July 6, 1874, A. G. Ms. and Letter Bk. K, 368, 374; see Carpenter, *Walt Whitman* (English Men of Letters Series, 1924).

took advantage of this provision, but in general the former method of preparing and signing opinions prevailed."<sup>22</sup>

The actual supervision of local federal law officers was yet to be tried. The Department of Justice Act had been passed, among other reasons, to eliminate numerous private counsel appointed by cabinet officers. Before the act had been signed by the President, a proposal came before the Senate to allot a sum to the Secretary of State to pay expenses for defending claims under a convention with Mexico. Senator Trumbull feared that this would revive the old system. "The theory of the bill which has been passed establishing the department of justice is that that branch of occupation ought to be abstracted from the Departments and centered in a Department by itself," said Senator Carpenter of Wisconsin. "Let us give that system a fair trial."<sup>23</sup>

On that note the new Department of Justice came into being, more than eighty years after Edmund Randolph had answered Washington's summons to become the first Attorney General. The simpler days of Pinkney, Wirt, and Taney were gone forever.

<sup>22</sup> See 13 and 14 Op. Drafts were prepared by a law clerk or, in more important cases, by the Solicitor General, Brewster to Allison, June 13, 1882, Ex. and Cong. Letter Bk. K, 614; Miller to Cooley, May 22, 1889, Letter Bk. U, 154.

<sup>23</sup> Cong. Globe, 41 Cong. 2 Sess., 4657, 4658.

## CHAPTER XII

### PEACE TO THIS HOUSE

THE Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution had given slaves their freedom and equal rights to citizenship and voting privileges. Technically, perhaps, reconstruction in the South was completed when the new state governments were recognized and their representatives were admitted to seats in Congress. To the dominant Republican element in the North, however, it was not completed and would not be completed until guarantees had been fully established to protect the newly acquired civil and political rights of the Negroes. This was to be the most difficult, the most dramatic, and the most sordid task to be performed by the new Department of Justice.

A month before the department came into existence, a law became effective to enforce the right of citizens to vote, generally known thereafter as the Enforcement Act.<sup>1</sup> It was intended to give effect to the provisions of the Fourteenth and Fifteenth Amendments as they applied to Negroes, although many provisions were stated in general terms without mention of the distinction of race. It sought to prevent or punish the disfranchisement of Negroes and carpetbag Republicans by force, intimidation, or other methods; and it provided an elaborate scheme of supervision for elections at which federal officers were chosen.

Attorney General Akerman came into office fully committed to the reconstruction program and with intense opposition to the activities of the Ku Klux Klan. "That any large portion of our people should be so ensavaged as to perpetrate or excuse such actions," he declared, "is the darkest blot on Southern character in this age." He soon recognized the magnitude of the task. "A spirited, yes, a des-

<sup>1</sup> 16 Stat. 140, May 31, 1870.

perate contest with bad men is in my judgment," said he, "the most expedient course for the friends of the Government in the South." "

With district attorneys and marshals located throughout the country, the new Department of Justice had a potential network of agencies with which to enforce the drastic provisions of the new law.<sup>a</sup> Eager that the department should have every available facility, California's Senator Cole of the Committee on Appropriations asked Akerman whether he could use a special appropriation for detective purposes. The Attorney General replied affirmatively. A small appropriation of \$50,000 was voted, and Akerman called upon Colonel H. C. Whitley, at the Treasury Department Secret Service headquarters in New York, to employ "capable and trusty persons" to detect and report violations of the Enforcement Act.<sup>4</sup>

In the meantime, Congress passed another drastic measure to enforce the provisions of the Fourteenth Amendment, which came to be known as one of the enforcement acts and also as the Ku Klux Act. It created civil and criminal liability for violence against individuals. It also authorized the President both to employ the army and navy for the suppression of disturbances and to suspend the writ of habeas corpus.<sup>5</sup> This supplemented the provision in the first Enforcement Act which authorized marshals to summon federal troops as posses whenever there was danger of forcible resistance to judicial process.

<sup>a</sup> Akerman Diary, April 9, 1874, Ms. in possession of Charles Akerman of Macon, Ga.; Akerman to Prossner, Nov. 9, 1871, Letter Bk. I, 127-128. The first task of Attorney General Akerman was to direct vigorous prosecutions of those persons who held state offices in violation of the Fourteenth Amendment and supplementary legislation designed to keep secessionist politicians out of public positions. 16 Stat. 140, Secs. 14, 15, May 31, 1870. He was deluged with requests for interpretations of the act, particularly as to what constituted participation in the rebellion. "There was scarcely a person in the South," said he, "who did not either positively give aid and comfort to the rebellion or positively oppose the rebellion." He went further. "Encouraging words addressed to adherents of the confederacy by men too old for active service or too poor for pecuniary contribution, or any other expression of sympathy, when prompted by a desire for Confederate success, amounts to giving aid and comfort to the Confederate cause." Akerman to Menefee, July 3, 1871, Letter Bk. H, 779. In 1872, however, most of these political disabilities were removed. Cong. Globe, 42 Cong., 2 Sess., 3252; 17 Stat. 142, May 22, 1872; *id.*, 956; 30 Stat. 432, June 6, 1898.

<sup>4</sup> See the New Orleans *Commercial Bulletin*, July 27, 1870.

<sup>5</sup> Akerman to Cole, Jan. 23, 1871, Letter Bk. H, 586; 16 Stat. 497, Mar. 3, 1871; Akerman to Whitley, June 28, 1871, Letter Bk. H, 777; Whitley to Williams, July 10, 1872, D. J. Ms.

<sup>6</sup> 17 Stat. 13, April 20, 1871.

It was only one side of the story that was brought to the Attorney General in the flood of complaints, charges, and demands for action that immediately poured into his office. Very few letters were received of the type sent by one William M. Byrd. "The South has been so thoroughly disorganized by the results of the late rebellion, and the sudden and radical disruption of its labor and social systems that occasional disorders and crimes are unavoidable," he wrote. "It is no easy matter to reconcile and harmonize, *in a short time*, the race prejudices of two distinct races, where one has so long been the master of the other; and especially when these prejudices are lashed into violence by ambitious politicians as a means to obtain office and power." \*

Such balanced sentiments as these were drowned by clamorous charges of outrage, murder, torture, arson, threats, and intimidation. Spirits kindled by war demanded action. Declaration of martial law was insisted upon by "your true & Loving Union Woman." Said another, "For God's sake & the Country's sake do send some efficient counsel down here at once to look into affairs. These rebels, without fault on my part, are persecuting me & my family to death. Send Ben. Butler or Jno. Langston." †

Other letters were ludicrous or pitifully ignorant. "I unfortunately got into a difficulty with a young Woman, my wife's sister, and we taken a little flight at her suggestion," wrote an Alabamian. "I could go back was it not for the K.K.K. They forbid my return not on account of the girl but on account of my political course in S.C. because I was a Radical." He had a "sickly and weekly" wife and six young children, and he asked for protection against "these midnight assassins" long enough to finish his crop. "Now Sir I do not pretend to justify my conduct in this case but I well know that the blame dont all rest on me and I have not transgressed against the laws of the land but against the laws of the Ku Klux, who are guilty of ten thousand times meaner crimes than the crime I am guilty of." ‡

\* Byrd to Williams, Sept. 10, 1874, D. J. Ms.

† Waynes to Grant, Sept. 18, 1874, D. J. Ms.; Brisbane to Williams, Sept. 22, 1874, D. J. Ms.

‡ Williams to Williams, May 13, 1873, D. J. Ms.

A few pleas written by or about the most helpless and inarticulate victims of "reconstruction" also found their way to the Department of Justice. A colored boy was flogged, "for no known reason, except he was talking of leaving his employer, when his time expired." One Negro had his corn "levied on and sold notwithstanding his white friend wanted to prove before the Justice, its necessity to his living." Another complained that he had been taken to a bridge at night and shot "through and through." \*

The district attorney in Kentucky maintained that these outrages were no new thing in the South but were a concomitant of the institution of slavery. The Ku Klux had always existed, but the organization was known as the "patrolers" and was protected by public sentiment. They whipped Negroes who were caught away from home or had committed offenses and dealt stringently with "abolitionists." A plaintive petition from a committee of colored men tells still another story. "To my friends of the republican party. Here we are here under many dangrs of our lives of the outrage Ku Kluks and other threts," said they inarticulately. "What for, jest so for you, and now we have call to you for help in time of kneed if you cannot give us sume rite to erfend ourselves. You are the cause of us to bee in this condition." <sup>10</sup>

In each southern state, reconstruction had its peculiar history. In Alabama District Attorney Minnis deplored conditions of chaos and outrage. "Whether it is possible, under our form of government, to redress such wrongs, when a large part of the resident population wink at them, I do not know," replied Akerman. "The state governments are designed to be the regular and usual protectors of person and property, and when they fail in this, through the indisposition of officials, or private citizens, it is hard to accomplish the result in any other way." When Minnis asked for instructions in cases of outrages committed not by Democrats but by Republicans, Akerman declared that members of one political party had no greater right to violate laws than those of the other. However, he was not willing to employ

\* Bonner to Grant, Dec. 1, 1871, D. J. Ms.; Warnoy to Sumner, Jan. 21, 1871, D. J. Ms.; Foy to Grant, Oct. 29, 1870, *ibid.*

<sup>10</sup> Wharton to Williams, Mar. 27, 1872, D. J. Ms.; Petition of Hartisville, Tenn., Committee, Nov. 9, 1870, D. J. Ms.



Democratic lawyers as special counsel. Republican lawyers, he said, "are more likely to have their hearts in the work."<sup>11</sup>

Sentiment against the enforcement acts grew more and more intense in Alabama. Early in 1872 the federal judge at Montgomery declared that it would be next to impossible to make arrests or to carry on trials without both infantry and cavalry. He told of grossest violence, of the burning alive of a woman who was white for living with a man who was black. He quoted from newspapers which inveighed against "bayonets doing judicial duty" and which promised that the hour was dawning when vengeance would repay the wrongs of power. Federal troops were used extensively in the state that year, and with their aid at one point a hundred of the most prominent Ku Klux were arrested. The following year, the marshal pleaded that the cavalry be allowed to remain; otherwise, said he, it would not be possible to make another arrest. Many other requests for troops were received, some of which warned that the state would be lost "to a dead certainty" without them.<sup>12</sup>

Before the Select Committee of the House of Representatives on Affairs in Alabama, Attorney General George H. Williams of Oregon, a Senator of the extreme faction who had succeeded Akerman, defended his actions. The party necessity of Radical leaders, it was charged, had driven them to create real or apparent disorder in the state and thus to secure federal intervention. Troops had not been quartered in mere apprehension of wrong and violence, Williams asserted, but to prevent the repetition of outrages that had been committed. He produced a volume of written statements to show that outrages had occurred and said that he had oral information as well. He maintained that he had not himself requisitioned troops but had merely suggested to the War Department that it would be advisable to station them in certain places. He admitted that he had had no communications on the subject from the governor, but Congressmen

<sup>11</sup> Akerman to Minnis, Feb. 11, 1871, Instr. Bk. B-1, 299; Akerman to Minnis, July 7, 1871, *id.*, 524; Minnis to Akerman, Aug. 21, 1871, D. J. Ms. (see Memorial of Convention of Colored Citizens, Montgomery, House Ex. Doc. 46, 43 Cong. 2 Sess., 9); Akerman to Minnis, Nov. 24, 1871, Instr. Bk. C, 64; Akerman to Minnis, Dec. 26, 1871, *id.*, 120.

<sup>12</sup> Busted to Williams, Mar. 29, 1872, D. J. Ms.; Healy to Williams, Feb. 1, 1873, *ibid.*; Gillette to General, Sept. 16, 1874, and letters following, D. J. Mss.; Williams to Healy, Sept. 29, 1874, Instr. Bk. E, 58.

from Alabama had been "urgent and importunate" that something be done for their state. He had not issued instructions that all deputies be appointed from the Republican ranks but merely that marshals appoint "prudent and careful men." Marshals, he added, had been warned not to use troops or exercise official power for partisan purposes.<sup>13</sup>

The majority of the committee found that the statements of violence and intimidation were substantiated by the testimony of reliable witnesses. Findings to the contrary were stated with equal conviction by the minority, who insisted that there was nothing in the state of society in Alabama to justify armed interference or the appointment of special deputy marshals as was done by the score "if not under the instructions of the head of the Department of Justice, at least with his assent and connivance."<sup>14</sup> Williams became known as Grant's "Secretary of State for Southern Affairs." Abuse poured upon him because of the administration's reconstruction policy; and when he was nominated for the Supreme Court in 1873, he was shown to be one of the most unpopular men in the country.<sup>15</sup>

The experience of Mississippi was similar to that of Alabama. Federal Judge Hill at Oxford, Mississippi, predicted in June 1871 that two hundred persons would be indicted under the enforcement acts and requested special counsel to argue the cases. The Attorney General sent Solicitor General Bristow, but for lack of funds, he rejected the plea of District Attorney Jacobson at Jackson for special assistance.<sup>16</sup>

In Mississippi, as in other states, wives testified to alibis for their husbands, as to their whereabouts on nights when the Ku Klux rode out upon its terrifying business.<sup>17</sup> The special term of the federal court at Holly Springs, Mississippi, had been adjourned because Dis-

<sup>13</sup> House Rep. 262, 43 Cong. 2 Sess., 1218-1249. <sup>14</sup> *Id.*, I-lxiii.

<sup>15</sup> Hesseltine, *op. cit.*, 361, 374. George Henry Williams (1823-1910) was born at Lebanon, New York, admitted to the bar in Iowa, became United States district judge in that state, was appointed chief justice of Oregon Territory, served in the United States Senate, and was then appointed Attorney General of the United States (1871-1875). He was mayor of Portland, Oregon, from 1902 to 1905. Nat. Cyc. of Am. Biog., IV, 21.

<sup>16</sup> Hill to Akerman, June 21, 1871, D. J. Ms.; Akerman to Wells, July 8, 1871, Instr. Bk. B-1, 524; Akerman to Jacobson, July 11, 1871, *id.*, 529.

<sup>17</sup> Jacobson to Akerman, July 25, 1871, D. J. Ms.; see also Hill to Bristow, July 28, 1871, *ibid.*; Akerman to Jacobson, Aug. 19, 1871, Instr. Bk. B-1, 586.

strict Attorney Wells had a packed jury on his hands. A large number of persons stood indicted for Ku Klux outrages. "If our kind hearted Judge can only be kept from destroying the effect produced by the convictions of these midnight assassins, I can in six months rid this entire District of Ku Klux," he reported. "In some parts of my District they are still riding, while in other parts they are only kept from it by the presence of the military." In some counties in that district it was not safe for an officer of the United States to go without protection. The raiders fled to Texas when discovered.<sup>18</sup>

Popular unrest in Mississippi threatened to come to a climax in organized revolt or intolerable violence as the time approached in 1875 when a new legislature was to be chosen. "No republican meeting can be held in safety," reported Marshal Dedrick at Jackson on September 8. On the same day Governor Ames notified President Grant that domestic violence prevailed beyond the power of the state authorities to suppress; and he called for federal aid, which Grant made available after consultation with Attorney General Edwards Pierrepont of New York, who had now succeeded Williams. The request of the governor stirred opposition in Mississippi among Republicans as well as Democrats, and after much correspondence the Attorney General withheld the troops and instead sent a close friend to investigate and conciliate.<sup>19</sup>

In the North Carolina reconstruction disorders the earlier prosecutions of the Ku Klux Klan were vigorous and successful. In June 1871, District Attorney Starbuck reported that the federal grand

<sup>18</sup> Wells to Williams, April 2, 1872, D. J. Ms.; and see Williams to Pierce, June 26, 1872, Instr. Bk. C, 361.

<sup>19</sup> Dedrick to Pierrepont, Sept. 8, 1875, D. J. Ms.; Pierrepont to Pres., Sept. 8, 1875, Ex. and Cong. Letter Bk. C, 479; Pierrepont to Pres., Sept. 8, 1875, *id.*, 481; Memorandum to Pres., Sept. 12, 1875, Ex. and Cong. Letter Bk. D, 414; Testimony of Chase, Sen. Rep. 327, 44 Cong. 1 Sess., 1801-1819; Pierrepont to Ames, Oct. 23, 1875, Letter Bk. L, 52.

Edwards Pierrepont (1817-1892) was born at North Haven, Connecticut, practiced law in Columbus, Ohio, and in New York, was elected judge of the superior court of the City of New York, became United States attorney for the southern district of New York, was appointed Attorney General (1875-1876) by President Grant, and then served as minister to Great Britain. Dict. Am. Biog., XIV, 587. Shortly after Pierrepont had become Attorney General he was required to prosecute the members of the notorious "whiskey ring," composed of internal revenue officers, St. Louis distillers, and official accomplices in Washington including some close friends of President Grant. Rhodes, *History of the United States* (1928), VII, 246 *et seq.*; *Testimony Before the Select Committee Concerning the Whiskey Frauds*, House Misc. Doc. 186, 44 Cong. 1 Sess.

jury had returned indictments against twenty-one different bands of men "going in disguise at night whipping, shooting and wounding unprotected citizens." In most of the cases, said he, "the proof shows that these outrages were committed to intimidate the victims to the abandonment of their Republican and Union principles." Federal Judge Bond was determined to put down these disorders. "I have great hopes of convicting a number of these Ku Klux gentry notwithstanding the secrecy and strength of their terrible organization," wrote Starbuck. "Should we fail in this, then I fear freedom of speech, of elections, yea, of civil liberty itself in this state is gone." <sup>10</sup>

The Klan was disorganized by the initial success of the prosecutions. Many men surrendered themselves for offenses under state laws, in the hope of escaping prosecution before the federal courts. Threats were made to rescue Ku Klux prisoners held in jail.<sup>11</sup> Early in October 1871, word reached the Department of Justice that pressure was being brought to have judgments suspended in cases successfully prosecuted in the federal court in North Carolina. The district attorney was directed to resist such moves. "The higher the social standing and character of the convicted party," wrote Solicitor General Bristow, "the more important is a vigorous prosecution and prompt execution of judgment." <sup>12</sup>

"We who were born and raised here know too well the terrible outrages committed by these bands of conspirators whose purposes were to destroy the freedom of elections and stab the Government at its vitals and who had never shown mercy to anyone," replied Starbuck for himself and Judge Bond, "to for one moment think of asking the least mitigation of the punishment fixed by law upon their crimes." He was proud of having won forty-nine convictions, the first in any federal court, and felt that "we are entitled to the gratitude and thanks of law abiding people every where and especially of the Republican or Union party of this nation which it was the purpose of this daring conspiracy to destroy." <sup>13</sup>

<sup>10</sup> Starbuck to Akerman, June 28, 1871, D. J. Ms.

<sup>11</sup> Morgan to Adj. Gen., July 7, 1871, and Morgan to Adj. Gen., July 15, 1871, *ibid.*

<sup>12</sup> Bristow to Starbuck, Oct. 2, 1871, Instr. Bk. B-1, 654.

<sup>13</sup> Starbuck to Bristow, Oct. 5, 1871, D. J. Ms.

Even though convictions were secured and a number of citizens sent away to northern prisons, the witnesses who had assisted found their lives in danger. Some appealed to the President. It was unsafe for them to return to their homes. The Attorney General could only exhort bravery. "As long as these bad men believe you are unable to protect yourselves, they will cherish the purpose of injuring you, as soon as the hand of the Government shall be withdrawn," he wrote. "But if you take the position that the country is as much yours as it is theirs—that you have as good a right to live in it as they—and that you are determined to live in it, and enjoy all your rights; or to die in it, bravely asserting your rights, when the law cannot protect you, you will teach them that you have a strength of your own; and this, in the end, they will respect more than the temporary exertion of the power of the U. S. Government." <sup>24</sup>

After the organization of the Klan had been destroyed in 1871 and 1872, the vigor of prosecutions in North Carolina was relaxed. Persons who had fled the state after the commission of petty offenses were permitted to return without molestation. "My intention is to suspend these prosecutions," declared the Attorney General, "except in some of the worst cases, with a hope that the effect will be to produce obedience to the law and quiet and peace among the people." In many cases judgment was suspended after pleas of guilty. Later, in April 1874, over the protest of the district attorney, he directed a dismissal of all cases except those involving charges of high crime. "The Government has reason to believe," he declared, "that its general intentions in prosecuting these offenses in North Carolina hitherto have been accomplished, that the particular disorder has ceased, and that there are good grounds for hoping that it will not return. At all events, it affords the Government pleasure to make an experiment based upon these views." <sup>25</sup>

In South Carolina the various forms of disorder were more serious. In October 1871 the writ of *habeas corpus* was suspended and troops were used. The Attorney General himself visited the area of

<sup>24</sup> Akerman to Prossner, Nov. 9, 1871, Letter Bk. I, 127.

<sup>25</sup> Williams to Lusk, June 21, 1873, Instr. Bk. D, 91; Williams to Lusk, April 25, 1874, *id.*, 511.

disturbance and maintained almost daily correspondence with the district attorney in an attempt to keep procedure orderly and above reproach. At the November term of the federal circuit court at Columbia four hundred and twenty indictments were found for violations of the enforcement acts. Five persons were tried and found guilty, and twenty-five pleaded guilty. "In every case submitted to a jury," reported the Attorney General proudly, "the verdict was against the prisoner notwithstanding the best defense which skillful counsel, with effective external aid, could make." \*\*

He recognized, however, the impossibility of trying all those accused and worked out a classification or schedule of offenses, remarkable as an example of the power of law officers. Those who had been leaders, who had been concerned in the acts of "deep criminality," or had contributed "intelligence and social influence" to the conspiracies should be tried and if found guilty subjected to the penalty of the law. Other participants should be released upon light bail and their cases not be pressed to a speedy trial. Those whose connection with the conspiracies had been "compulsory and reluctant" and who showed penitence for their offenses and a determination to abstain in the future should make confessions in writing and promise to be good citizens. \*\*

District Attorney Corbin drafted some indictments under the enforcement acts. He was of the opinion that he could rest others directly upon provisions in the Constitution. He would charge conspiracies with intent to interfere with the constitutional right of a citizen to be secure in his person, home, papers, and effects against unreasonable searches and seizures. Since the Klan had seized the arms of the Negroes, he felt that he could rely also on the constitutional right to keep and bear arms. "It is a little novel to be setting up constitutional rights in an *indictment*," he admitted, "but I think this is one of those occasions when a few people down here would like to *feel* the protection of that instrument." While the Attorney

\*\* Ann. Rep. Atty. Gen. 1871, 6; Corbin to Akerman, Nov. 3, 1871, D. J. Ms.; Akerman to Corbin, Nov. 10, 1871, Instr. Bk. C, 33; Corbin to Akerman, Nov. 13, 1871, D. J. Ms.; Ann. Rep. Atty. Gen. 1871, 7.

\*\* Akerman to Corbin, Nov. 10, 1871, Instr. Bk. C, 28; and see Corbin to Williams, Feb. 20, 1872, D. J. Ms.

General had doubts on the question of search and seizure, "upon the right to bear arms, I think you are impregnable," he replied."

Other things allayed the speed and vigor of prosecutions which the district attorney had promised. Expenses of the federal courts in South Carolina exceeded appropriations. A total of \$87,850 was sent to the state for May, June, and July, and a requisition for \$9,000 awaited action in August. "At the present rate of expenditure, the courts in South Carolina will cost the Government nearly \$300,000 per annum," came a stern warning from the Department of Justice. "This cannot be allowed to continue." "There were perhaps one thousand indictments pending, and the district attorney finally concluded that only a few of the cases should be brought to trial. One reason why all cases should not be dropped immediately upon the close of a political campaign, he felt, was that critics could say "with much apparent truthfulness, they now had the proof positive, that whatever of reality there was in the existence or crimes of the Ku Klux Klan the *motive* of the administration in their prosecution was purely political." "

In Louisiana the particular organization called Ku Klux Klan was less important, but there was the same organized violence. Federal troops kept order, but the writ of habeas corpus was not suspended. There were many arrests, but few indictments, fewer trials, and rarely a verdict of guilty. In Baton Rouge, on election day in 1870, an armed mob attacked the commissioners of election as the votes were being counted. The Republican candidate for the legislature, among others, was killed. The marshal, who was also chairman of the Republican state committee, announced the arrest of sixty-four persons. The riot, said the *New Orleans Republican*, had been well planned and partially executed. There was a concerted rush with volleys of gun fire before the troops arrived. "The number of Republicans, mostly colored, shot during the rioting was about

"Corbin to Akerman, Nov. 13, 1871, *ibid.*; Akerman to Corbin, Nov. 16, 1871, Instr. Bk. C, 47; Corbin to Akerman, Nov. 17, 1871, D. J. Ms.

"Williams to Wallace, Aug. 27, 1872, Instr. Bk. C, 438; see also Williams to Corbin, Aug. 29, 1872, *id.*, 440.

"Corbin to Williams, Nov. 2, 1872, D. J. Ms.; Ann. Reps. Atty. Gen. 1872, 26-27; 1873, 28-29; 1874, 26-27.

twenty, besides four killed outright," said the *Republican*. "Only one Democrat was injured." <sup>81</sup>

Political violence continued during the following months.<sup>82</sup> The state election toward the close of 1872 threatened to end in a local war. In the midst of gross corruption, both the Republican and the Democratic candidates claimed election as governor. The election board, dominated by the outgoing governor who was a disaffected Republican, was throwing its weight toward the Democrat. The Republican lieutenant governor, a mulatto named Pinchback, called for the protection of federal troops. The Attorney General advised Pinchback to issue a proclamation that the President recognized him as the lawful executive of Louisiana—and the Republican faction of the legislature as the true legislature—and would provide all necessary assistance.<sup>83</sup>

"Your visit with a hundred citizens will be unavailing so far as the President is concerned," peremptorily replied Williams to the protests of the Democratic candidate McEnery. "His decision is made and will not be changed and the sooner it is acquiesced in the sooner good order and peace will be restored." <sup>84</sup> William Pitt Kellogg, the Republican candidate for governor, together with a legislature sympathetic with his party, was placed in office; <sup>85</sup> and thus the administration at Washington saddled itself with embarrassment and the State of Louisiana with more chaos by sponsoring a weak and unpopular state government.

Innumerable evils grew. Among them was the dispute over local offices, which resulted in the tragedy known as the Colfax Massacre or the Grant Parish Massacre. The little town of Colfax was on the huge estate of William Calhoun, now a Republican and friendly to the colored people. Many Negroes, some of them former slaves of his father's, lived in the vicinity. Rivals from the opposing political

<sup>81</sup> Packard to Akerman, Nov. 10, 1870, D. J. Ms.; *New Orleans Republican*, Nov. 10, 1870, sent with Packard to Akerman, Nov. 10, 1870, *ibid*.

<sup>82</sup> Packard to Akerman, July 1871, *ibid*.; Dunn to Packard, July 28, 1871, *ibid*.; Dunn to Grant, July 29, 1871, *ibid*.

<sup>83</sup> Williams to Pinchback, Dec. 11, 1872, Letter Bk. I, 513; Williams to Pinchback, Dec. 12, 1872, *id.*, 516.

<sup>84</sup> Williams to McEnery, Dec. 13, 1872, *id.*, 523.

<sup>85</sup> See the testimony in Sen. Rep. 457, 42 Cong. 3 Sess.



factions claimed the offices of sheriff and judge. One Shaw, commissioned as sheriff by Governor Kellogg, summoned a posse of Negroes and seized William Calhoun's brick warehouse, which was used as the courthouse of the parish.

Political enemies, unfriendly to the Negro whenever the latter sought a position of authority, and persons stirred by rumors of atrocities about to be perpetrated by the colored people moved in bands upon Colfax. On April 15, 1873, the Negroes were besieged, burned out of the courthouse, and callously shot down. Accounts of this butchery spread rapidly throughout the country. Public sentiment demanded immediate and drastic punishment of the assailants, but effective action from the weak Kellogg state administration was not to be expected.

An investigator, J. J. Hoffman, was detailed by the Department of Justice to secure evidence, and on the basis of his report ninety-six persons were indicted under the Enforcement Act of 1870. It was one thing to secure indictments, however, and another to arrest the accused persons.\*\* Marshal Packard visited Washington and conferred with the Attorney General. Governor Kellogg had agreed to furnish and maintain the force needed to make the arrests. On his return to Louisiana, however, Packard found the state appropriation for the militia so nearly exhausted that no rations would be available unless the federal War Department could be persuaded to provide them. There were other difficulties. "The country there is full of Bayous, Lakes and Rivers, and an effective pursuit, capture and detention of the accused will require that a steamboat of light draft be used for the transportation of the troops necessary as a posse," he wrote. The state owned a boat in every way suitable and would lend it without compensation, but for want of funds the state authorities were unable to provide fuel and pilots. "I shall be able to enforce the arrest of the accused or a portion of them," he promised, "if the War Department will permit the sale of rations to the Militia and will furnish fuel and pilots for the Steamboat." \*\*

Finally, W. J. Cruikshank and eight others were arrested, and the

\*\* Whitley to Williams, July 15, 1873, D. J. Ms.; Beckwith to Williams, June 11, 1873, *ibid.*; Williams to Beckwith, June 16, 1873, Instr. Bk. D, 84.

\*\* Packard to Williams, Sept 6, 1873, *ibid.*

nine were brought to trial in the federal circuit court before Judge W. B. Woods. The jury deliberated three days, returned a verdict of "not guilty" for one but could not agree as to the remaining eight. The eight were remanded to prison, and the one acquitted was rearrested upon an indictment identical with its predecessor except for the substitution of the names of different Negroes as victims." The date of the new trial was set for May 18, 1874.

The district attorney approached the new trial with forebodings of disaster. The jury which had rendered the "beggarly verdict" on the last trial, he wrote the Attorney General, was intimidated; and he doubted if another could be found "with courage enough to convict under any pressure of proof." Furthermore, counsel for the defendants had persuaded Justice Bradley of the Supreme Court of the United States to sit with Judge Woods, and an opinion prevailed that Justice Bradley doubted the constitutionality of the Enforcement Act."

The court permitted a motion—to strike out certain counts in the indictment—to be argued by counsel for the defendants in the presence of the jury, and much was said against the constitutionality of the law which the jury could not be expected to forget. The district attorney refused to argue the question, on the ground that it was not properly raised. The next morning Justice Bradley delivered the ruling of the court—that the question should be raised later by a motion in arrest of judgment if the defendants were convicted. "It was an ill starred hour for this state when he put in his appearance in this Circuit in time to meddle with the trial," reported District Attorney Beckwith after a second verdict of not guilty. "His presence in the district was to me a nightmare while he remained." "

When Justice Bradley left New Orleans he intimated that he would participate in any further proceedings in the case. "Of course his power to enforce his notion of law and Constitution is unlimited," declared Beckwith. The government could appeal, but then Bradley would sit with his colleagues in the Supreme Court to review his own decision. "It is unfortunate," complained the district attorney, "that

" See the report of the Committee of Seventy, House Rep. 261, 43 Cong. 2 Sess., 899-900.

" Beckwith to Williams, June 25, 1874, D. J. Ms.

" Ibid.

such complications should meet me after such a laborious trial and such an unsatisfactory verdict." <sup>41</sup>

While the murder counts of the indictment had failed, verdicts of guilty were secured on conspiracy counts. A motion in arrest of judgment was made by the defense. Bradley wrote an opinion. The indictments were poorly drawn, he declared, because they did not state that the offenses were committed because of race, color, or previous condition of servitude. Neither the Enforcement Act nor the Fourteenth Amendment, said he, was to be interpreted so broadly as to include the general protection of persons or property. <sup>42</sup>

Beckwith and other district attorneys throughout the South were astounded. This meant that the provision so much relied upon in the breaking up of the Ku Klux Klan either had been interpreted too broadly or was unconstitutional. Federal Judge Ballard in Kentucky brought additional consternation among the Republican friends of reconstruction by charging a grand jury that the Enforcement Act, as broadly construed, was definitely unconstitutional. Judge Bond at Richmond, Virginia, as definitely upheld it. But Bond's colleague, District Judge Hughes, agreed with Justice Bradley. <sup>43</sup> Here was a nice disagreement in a vital matter.

The persons convicted of participation in the Colfax Massacre were released pending the time when the Supreme Court should review the case—which meant that in no event would they be recaptured and compelled to serve sentences. The trial, upon which so much energy had been expended, had accomplished nothing. McEnery, still Kellogg's rival for the office of governor, spread the rumor that Kellogg had applied for troops unsuccessfully. He further hinted, so Kellogg wrote Attorney General Williams, that Justice Bradley "acted on inspiration received from the Administration." <sup>44</sup>

An election was approaching. Disorders recurred, often under the direction of the "White League." The Coushatta Massacre, in

<sup>41</sup> *Ibid.* <sup>42</sup> *U. S. v. Cruikshank*, Fed. Cas. 14,897.

<sup>43</sup> See the *Nation*, Oct. 24, 1872, 263; *U. S. v. Petersburg Judges of Election*, Fed. Cas. 16,036.

<sup>44</sup> Kellogg to Williams, Aug. 26, 1874, D. J. Ms.

midsummer of 1874, in which six white Republican officeholders were murdered after they had complied with the demand for their resignation and surrendered themselves, was the first of the extensive crimes generally attributed to the League; and thereafter attempts to overthrow the Kellogg government, which failed only because of interference by federal troops, were carried on with the League's aid. "While Bradley's action stands unreversed, that fact together with the terrorism resulting from repeated acts of barbarity perpetrated for purposes of intimidation will render it impossible to get a jury in this district of sufficient courage to punish even the Coushatta outrage," reported Beckwith. "Any trial in the present condition of affairs will be simply an expensive mockery." <sup>44</sup>

The Attorney General agreed that prosecutions should be suspended until a decision by the Supreme Court and recommended that prisoners be admitted to bail. He expected a decision at the coming term of the Court, but was eager to secure first a ruling on another section of the Enforcement Act where the right to vote was directly involved. <sup>45</sup> A case had come up from Kentucky, wherein two inspectors of a municipal election had been brought to trial for refusing to receive and count the vote of a Negro. This case, *United States v. Reese*, was argued by Attorney General Williams and Solicitor General Phillips before the Supreme Court in January 1875. On the other side was Henry Stanbery, who had been President Johnson's Attorney General nine years earlier. The *Cruikshank* case was argued the following March and April, Reverdy Johnson, who had been Attorney General under Taylor in 1849 and 1850, appearing among defense counsel. The Supreme Court deliberated for a year.

In the *Reese* case the Court finally held that the third and fourth sections of the Enforcement Act of 1870, which dealt with the right to vote, were phrased too broadly to be constitutional; they were not confined to distinctions based on race, color, or previous condition of servitude. <sup>46</sup> The *Cruikshank* case was decided upon the same prin-

<sup>44</sup> Beckwith to Williams, Oct. 27, 1874, *ibid.*; Rhodes, *History of the United States*, VII, 177-178.

<sup>45</sup> Williams to Beckwith, Nov. 7, 1874, Instr. Bk. E, 129; Williams to Beckwith, Oct. 20, 1874, *id.*, 101.

<sup>46</sup> *U. S. v. Reese*, 92 U. S. 214 (1876).

ciple. The Court reiterated the argument of Justice Bradley that the indictment had not stated racial discrimination. "We may suspect that race was the cause of the hostility," said Chief Justice Waite, "but it is not so averred." Those parts of the indictment which did mention race did not specify the rights infringed and hence were "too vague and general." As to the remaining charges, the right of peaceful assembly was not granted by the federal Constitution and hence not within the power of the federal government to enforce, and the same was held true respecting the right to bear arms. Moreover, the State of Louisiana, as distinguished from its citizens, had not deprived the Negroes of their lives or liberty without due process of law. The due process clause reached only official state action and not the unauthorized violence of state citizens, and the same was true of the equal protection clause."

These decisions all played their part in checking the vigor of the protection of the Negro in the South. Moreover, they were contemporaneous with a growing weariness in the North at the whole business." President Hayes early in 1877 withdrew the last of the troops, and the appropriation act of June 18, 1878, forbade the use of any part of the army of the United States as a marshal's *posse comitatus*. State governments thereafter were to stand or fall on their own ability to maintain themselves. One of the governments to fall was the Republican administration in Louisiana, where S. B. Packard, for many years United States marshal and Republican state chairman, occupied the governor's chair.

In Tennessee Circuit Judge Baxter and District Judge Trigg differed on the validity of the Ku Klux Act. In 1883, on the basis of the *Reese* and *Cruikshank* cases, the Supreme Court made short work of some of the provisions of this statute."

A new measure now threatened to perpetuate the legal battles in the South. Between the time of the Bradley decision in the lower court and the Supreme Court decisions in the *Reese* and *Cruikshank* cases, Congress passed the famous Civil Rights Act which had been under

<sup>44</sup> *U. S. v. Cruikshank*, 92 U. S. 542 (1876).

<sup>45</sup> See Warren, *op. cit.*, III, Ch. 34.

<sup>46</sup> *U. S. v. Harris*, 106 U. S. 629 (1883).

consideration for a number of years. Its purpose was to improve the status of Negroes by providing that race, color, and previous condition of servitude should not be made the basis of discrimination in granting accommodations in inns, public conveyances, or places of amusement.

In 1883, in the *Civil Rights Cases*, Justice Bradley, speaking for the Supreme Court, rephrased the argument which he had presented for the circuit court nine years earlier and held the relevant provisions of the new act unconstitutional. The amendments to the Constitution applied to the state laws and proceedings, he said, and not to the deeds of innkeepers, railroads, or other private persons or organizations.<sup>81</sup> One more barrier in the way of the desire of the white population of the South to govern in its own fashion had been removed.

The next year, however, the Supreme Court sustained those provisions of the Enforcement Act and the Ku Klux Act which made criminal the conspiracies of individuals to prevent the freedom of voting for members of Congress. These the Court found valid not under the amendments but under the original Constitution. Negroes having been given the right to vote; Congress could protect its exercise against threats, intimidation, or violence of individuals, without mention of race or color.<sup>82</sup>

The Department of Justice then turned to the prosecution of election frauds, but evidence was hard to secure and southern juries were not easily persuaded. The letters of the district attorneys were filled with complaints or apologies, and occasional success was hailed as a major achievement. On the other hand, the colored race did not lose everything sought for it by the federal government. The theoretical right of suffrage remained, even though limited by extra-legal techniques in each locality; and the right to serve on juries was enforced in some cases.<sup>83</sup> Conditions of slavery were not restored, as abolitionists had feared.

<sup>81</sup> *Civil Rights Cases*, 109 U. S. 3 (1883).

<sup>82</sup> *Ex parte Yarbrough*, 110 U. S. 651 (1884).

<sup>83</sup> *Strauder v. West Virginia*, 100 U. S. 303 (1880); *Ex parte Virginia*, 100 U. S. 339 (1880); *Neal v. Delaware*, 103 U. S. 370 (1880).

Reconstruction had brought upon the Department of Justice tremendous criticism. "The Inflation of the Attorney General," was the title of an article in the *Nation* in the autumn of 1874. "The control of the troops in the Southern States," said the article, "has been transferred to the Attorney-General, who moves them on the marshal's report." The Attorney General's office, it continued, "has become a kind of political bureau, to which competitors for the government of sovereign States carry their petitions and proofs. Southern governors now report to him on the State elections, on the general condition of the State, on its finances and taxation, its criminal justice, and take his advice as to internal legislation. Political parties send in to him statements of their grievances, and ask him for redress against the tyranny or exactions of the local rulers, and he accepts all the power and influence which the position brings him with great equanimity. He snubs the proud, warns the unruly, discourages the wicked, and cheers on the faithful supporters of the Administration." \*\*

Similar criticisms were made in Congress. It was said that the Department of Justice was honeycombed with fraud. There had been gross abuses under the fee system by which marshals were paid. Gross usurpation of authority in Louisiana was charged. "I assert," declared Representative Beck of Kentucky, "that the Department of Justice has used the Army of the United States for the basest of purposes. The Attorney-General has sent his marshals and secret-service thieves all over the land—to Alabama, Louisiana, South Carolina, and elsewhere—for purposes of wrong and oppression. I repeat, it is a Department of *injustice* instead of a Department of *Justice*." \*\*

If there were reasons of logic, economy, and efficiency for bringing the Department of Justice into existence, those who recommended its creation could hardly have foreseen the setting of racial, sectional, and partisan passion in which it was first to function. It was a period of great travail and many mistakes. The South could not realize that its civilization and culture were to pass into new forms; nor could the North comprehend that forbearance should be

\*\* The *Nation*, Oct. 1, 1874, 214.

\*\* Cong. Rec., 43 Cong. 2 Sess., 153.

the guiding principle of a reconciliation based on ties of blood and of shared political traditions. It was more than a decade after Lee's surrender before the sword of force began to rust in its scabbard and the attempt to impose a new order upon the South by legislative fiat and executive decree ended.



## CHAPTER XIII

### THE WILD WEST

IN the '70's and '80's the eyes of the nation were occasionally drawn from the tragic spectacle in the South to the more romantic West. Beyond the Mississippi an empire was in the making. The establishment of law and order was essential if settlers were to prosper and commerce grow. At the same time, however, the "wild" West was the haven of spirited people, impatient with the processes of settled society. More than that, it was the rendezvous of the lawless, particularly in or near the Indian Territory, which was, as a local grand jury described it, "a most productive garden for the propagation, growth, and commission of crimes."<sup>1</sup>

A penurious Congress found it inadvisable to attempt to police an area so vast and so sparsely settled. Rugged character was required for survival in these outposts of civilization. Could not settlers be depended upon to order matters among themselves as easily as they could fight the Indians and the elements? When organizations of citizens, the vigilantes, became the guise of the lawless, the federal government kept hands off.<sup>2</sup>

The domain to the west was the spoil of the brave, or the desperate. Congress gave them lands and minerals. The military attempted to suppress open Indian war. Territorial and later state governments together with the United States marshals and attorneys were left to keep the peace as best they could, while outlaws pillaged, trains were robbed, and the processes of justice flouted. It was an eventful occasion when District Attorney Waters wired on April 3, 1882, "Jesse James was killed in St. Joseph today."<sup>3</sup>

It was more than difficult to secure competent district attorneys in a land where the law was little known and good men were carving

<sup>1</sup> Ann. Rep. Atty. Gen. 1894, 19-23; Miller to Bynum, Jan. 30, 1892, Ex. and Cong. Letter Bk. No. 8, 205.

<sup>2</sup> See Cushing, 8 Op. 8.

<sup>3</sup> Waters to Cameron, April 3, 1882, D. J. Ms.

estates for themselves out of the wilderness. Brigadier General Garland, for example, wrathfully demanded the removal of District Attorney Jones. "In the first place, he has given a great deal of annoyance to the military by impertinent intermeddling in their affairs; in the second place he is notoriously the greatest liar and blackguard in New Mexico." <sup>4</sup>

The marshals were restricted to a posse of three, and the red tape for the execution of process, though tolerable east of the Mississippi, was utterly impracticable on the frontier. "We imagine that a traveler would meet with less difficulties to obtain receipts or vouchers in the English language among the Hottentots and Eskimos than in a majority of the route localities in the Indian Territory," said a federal grand jury. <sup>5</sup>

There were also occasions when desperadoes masqueraded under the badge of federal authority. "Bill Dalton," exclaimed Senator Vest of Missouri to his colleagues, "is walking our streets armed with a repeating gun and a commission as a deputy United States marshal." The Attorney General thereupon investigated, but had difficulty securing even an answer from the marshals in the Indian Territory. Indeed, as late as 1903, the Department of Justice had inquiry about "a form of court mounted on wheels, which is conveyed from place to place wherever the intervention of justice is required." It was then discovered that the "presiding judge" was Marshal Leo E. Bennett of the Indian Territory. <sup>6</sup>

This perambulatory marshal's court was indicative of another weak link in western justice. Congress and the territories provided few courts and fewer judges. The Territory of Utah refused to appropriate any money for courts. In the Indian Territory, the United States itself was remiss. "Owing to the parsimonious action of Congress, these courts for more than half the time are without money to operate," reported the grand jury for the western district of Arkansas. "If Congress will give this country full jurisdiction and a system of courts sufficient to administer the laws," added the federal judge,

<sup>4</sup> Garland to Cass, June 30, 1857, A. G. Ms.

<sup>5</sup> 11 Stat. 363, Sec. 3, June 14, 1858; Ann. Rep. Atty. Gen. 1894, 20.

<sup>6</sup> Miller to Needles and Grimes, Dec. 22, 30, and 31, 1892, Instr. Bk. No. 27, 16, 122, 153. *Court on wheels*: Acting Atty. Gen. to Gilliams, Sept. 28, 1903, Misc. Letter Bk. No. 58, 486.

"the train robbers and outlaws who have lately terrorized certain portions of this Territory and seriously arrested the commerce of the country could not longer exist." \*

It was also a matter of the greatest difficulty to secure competent and honest judges for the few existing courts, and the Presidents and Attorneys General were constantly required to investigate and remove the corrupt or the grossly inefficient. To make matters worse, the territorial judges sat in the trial courts and then in the appellate courts to review their own decisions. When appointments were made from men outside the territories, there was local clamor for resident judges.<sup>9</sup> The Attorneys General persistently called attention to the need of funds and of legislative provisions for juries, for service of process, and for the jurisdiction and places of holding courts.<sup>9</sup> Little more could be done than to urge judges, district attorneys, and marshals to do their utmost.

While Indian relations were supervised by the Department of the Interior, the Department of Justice was expected to defend Indian rights generally, to conserve their property and lands, and to prohibit the liquor traffic with them. For this last service, a single special agent of the department was appointed in the '80's to police a vast area, with no cooperation from local residents and sometimes scant sympathy from the courts.<sup>10</sup>

Though problems affecting western life, property, and the red man stirred no great feelings east of the Mississippi, polygamy among the Mormons evoked both legislative and executive wrath. In 1858 Attorney General Black had prepared an elaborate letter of instructions for the new district attorney of the Utah Territory. "The

\* *Utah*: Ann. Reps. Atty. Gen. 1877, 18; 1878, 19; 1879, 19; 1880, 23; 1881, 19; 1882, 16; 1883, 14; 1884, 14. *Indian Territory*: *Id.*, 1894, 22.

<sup>9</sup> *Judges*: Ex. and Cong. Letter Bk. V, 357; *id.*, No. 8, 205; Misc. Letter Bk. No. 7, 88, 425; No. 3, 79, 84, 237; No. 10, 187; No. 15, 193; No. 16, 302; No. 21, 375; No. 23, 323; Instr. Bk. No. 26, 64. *Appeals*: Ann. Reps. Atty. Gen. 1882, 12; 1883, 14; 1884, 11.

<sup>10</sup> Ann. Reps. Atty. Gen. 1874, 19; 1877, 18, 19; 1883, 13; 1884, 10; 1886, 16; 1887, 14; 1888, 13; 1890, 19; 1895, 5; 1896, 5; 1905, 12.

<sup>11</sup> *Lands*: *Id.*, 1891, 19; 1892, 18; 1893, 17; 1894, 17; 1895, 21, 25; 1896, 28; 1897, 27; 1910, 32, 85; 1911, 29; 1912, 38, 63. *Liquor traffic*: See Instructions to Examiners (1888-1907), Bks. 1 to 9; Letter Bk. Q, 115; Instr. Bk. No. 11, 138; Instr. Bk. L, 63; Ann. Reps. Atty. Gen. 1910, 83; 1912, 63. *Indian depredation claims*: *Id.*, 1891, 8; 1894, 8; 1903, 50; 1906, 40; 1907, 41; 1908, 47; 1909, 63; 1911, 72. *Other Indian matters (appeals and crimes)*: *Id.*, 1893, 28; 1908, 15; 1909, 21; 1910, 78; 1912, 63; Harmon to Chief White Hair, Oct. 7, 1896, Misc. Letter Bk. No. 25, 7.

universal sentiment of the Union is shocked," he wrote. "By the whole Christian world a plurality of wives is regarded as the worst feature of Asiatic manners, and of semi-barbarous life; incompatible alike with public prosperity and domestic happiness." Yet there was no statute against polygamy. "The law must be administered as it is," he concluded, "and not as we would have it be."<sup>11</sup>

Congress in 1862 prohibited polygamy, "evasively called spiritual marriage," for the future in the territories, "however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances"; and Congress limited the amount of property to be held by religious corporations.<sup>12</sup> But there were said to be wholesale evasions, and the question continued to be agitated.

In 1875, Attorney General Pierrepont reported the case of the nineteenth wife of Brigham Young. The courts, it seemed, had treated her as a lawful wife by granting alimony and counsel fees. Pierrepont, like Black, was shocked. "Then," said he, "the offspring of such illicit intercourse must be regarded as legitimate, and the courts of the United States will thus give countenance to a social system corrupting and degrading, abhorrent to the principles of the Christian religion, and never yet permitted by any Christian nation."<sup>13</sup>

Congress passed two more statutes, in 1882 and 1887, and directed the Attorney General to enforce forfeitures of property against the Mormon religious corporations. These matters continued to vex the Department of Justice until the Mormons finally bowed to the sentiment of the country.<sup>14</sup>

While justice in the West remained little more than a picturesque phenomenon to those in the industrial East, repercussions nearer home threatened many a public scandal. One of these came to light in the star route cases, which mirrored corruption in official Washington of the '80's. Where the post was carried by stagecoach and on horseback through sparsely settled areas, mail routes in the West were called "star routes." Contracts were let to lowest bidders for

<sup>11</sup> Black to Wilson, Aug. 1858, A. G. Ms.

<sup>12</sup> 12 Stat. 501, July 1, 1862.

<sup>13</sup> Ann. Rep. Atty. Gen. 1875, 7, and see 1879, 6.

<sup>14</sup> 22 Stat. 30, Mar. 22, 1862; 24 Stat. 635, Sec. 13, Mar. 3, 1887. Ann. Reps. Atty. Gen. 1887, 17; 1888, 16; 1889, 16; 1890, 15; 1891, 16-17; 1892, 21; 1893, 18.

carrying mail at certain intervals. The Post Office might direct more frequent trips and adjust the compensation accordingly. Local Congressmen were interested, and deficiency appropriations were provided with little protest.

This left ample room for abuse. Contract "rings" were organized. At the expiration of old contracts, ridiculously low bids were submitted. Then the contractors would arrange to have their contracts modified to provide that the mail be carried with much greater frequency and their compensation increased. The mail service remained much as before, but the extra compensation ran to fat profits of millions of dollars over a period of a very few years.<sup>18</sup>

As early as 1872 the disclosures of A. M. Gibson, Washington correspondent of the New York *Sun*, turned public attention upon star route abuses. There was an occasional investigation, but Pacific railroad scandals and other evidences of low political morality during the period distracted public interest. The postal abuses continued throughout the administration of President Hayes and were generally known during the presidential campaign of 1880. Detailed disclosures resulted from investigations conducted under the Garfield administration in 1881, after a series of articles in the New York *Times* had once more brought the matter to public attention.

Prominent among the leaders of the contract ring was Stephen W. Dorsey, former United States Senator from Arkansas, who was secretary of the Republican National Committee in 1880. He particularly opposed the selection of Thomas L. James, postmaster in New York, as Postmaster General. James was already suspicious of the management of the star route business and was known to be both thorough and honest. Dorsey failed to prevent the appointment, and the new Postmaster General indignantly turned the spotlight upon his own department and upon Dorsey's connection with it.

After a conference with President Garfield, James chose P. L. Woodward, formerly a special agent of the Post Office Department, to conduct the investigation.<sup>19</sup> He employed A. M. Gibson, who had

<sup>18</sup> For an account, see Klotsche, *The Star Route Cases* (Dec. 1935), Miss. Valley Hist. Rev.

<sup>19</sup> See *Testimony Relating to Expenditures in the Department of Justice*, 48 Cong. 1 Sess., House Misc. Doc. 38, Pt. 2, 1, 16.

provided the New York *Sun* with material for attacks upon star route abuses. Investigations were begun in the department at Washington, and agents were sent to inspect the operation of the star routes. When the gross nature of the abuses became apparent, Postmaster General James and Special Agent Woodward took their evidence to the President.

Garfield called in Attorney General MacVeagh of Pennsylvania, a member of the Independent wing of the Republican party. His appointment, too, had been opposed by the Dorsey element, but he insisted that Garfield consider the political consequences of prosecutions. They would affect Dorsey, whose activities had had much to do with Garfield's election. They might affect Senator William Pitt Kellogg of Louisiana, at a time when the Republicans had only a bare majority in the Senate. Once the administration had taken a stand, neither the Postmaster General nor the Attorney General would know either friend or foe. The President walked across the room and reflected a moment. "I have sworn to execute the laws," said he. "Go ahead regardless of where or whom you hit. I direct you both not only to probe this ulcer to the bottom, but to cut it out."<sup>17</sup>

It soon became apparent that Second Assistant Postmaster General Thomas J. Brady was involved and that he must be removed. The President directed his removal, then reluctantly consented that he be permitted to resign. A number of experienced postal inspectors were called to Washington for conference and were instructed to secure evidence. Attorney General MacVeagh, who was present when instructions were given, remarked that inspectors usually brought back what they were sent to get, but that this time they were not being sent out to get facts of a particular kind. Both he and the Postmaster General would be relieved to discover that the charges of corruption were unfounded; but they wanted the facts, whatever they might happen to be.

<sup>17</sup> *Id.*, 4. Isaac Wayne MacVeagh (1833-1917) was born in Chester County, Pennsylvania, practiced law in West Chester and later at Harrisburg, served in the army during the Civil War, was appointed minister resident in Turkey, fought for political reform, headed a commission that was instrumental in bringing about a settlement of the reconstruction difficulties in Louisiana, and served as Attorney General in 1881. He was later ambassador to Italy and then chief counsel for the United States in the Venezuela arbitration dispute of 1903. *Dict. Am. Biog.*, XII, 170.

The government accumulated and gave to the press evidence of fraud on ninety-three routes. The *National Republican*, principal Republican organ in Washington and owned by Brady, poured out abuse on the President, the Postmaster General, and the Attorney General. The investigation, it charged, was mere persecution. Montfort C. Rerdell who had worked with Dorsey as a clerk and secretary made a confession to James and MacVeagh and promised to provide records implicating Brady, Dorsey, his brother, John W. Dorsey, and others. But Rerdell was persuaded to recant his confession before he turned over the records.

The assassination of President Garfield in the summer of 1881 delayed the proceedings. Moreover, the investigations were looked upon as the responsibility of the more liberal wing of the party, which stood in opposition to the "Stalwart" faction to which Vice President Arthur belonged. Some believed that the close connection said to exist between the contractors and the friends of Arthur would end the investigation and prevent prosecutions when Arthur succeeded to the Presidency. The investigation continued, however, under the direction of MacVeagh and James. It was thought best to employ special counsel. MacVeagh selected Benjamin H. Brewster of Philadelphia and invited James to nominate another. James chose George Bliss, formerly district attorney in New York. W. W. Ker was later retained to draft indictments, and he remained to take considerable responsibility.

So keen was the rivalry between the two factions of the Republican party that both MacVeagh and James resigned. President Arthur desired that MacVeagh remain to handle the star route cases as special counsel if not as Attorney General. MacVeagh, however, declined to accept. Arthur thereupon chose Brewster, whom MacVeagh had appointed as special star route counsel, to be Attorney General.<sup>18</sup> The new Postmaster General gave little aid. Perhaps not much was needed by this time, but to many it seemed significant when his son-in-law appeared among counsel for the defense.

<sup>18</sup> Testimony of Brewster, July 3, 1884, House Misc. Doc. 38, 48 Cong. 1 Sess., Pt. I, 844. Benjamin Harris Brewster (1816-1888) was born in Salem County, New Jersey, graduated from Princeton, became a leading member of the Philadelphia bar, and served as attorney general of Pennsylvania. See Savidge, *Life of Benjamin Brewster, with Discourses and Addresses* (1891), and Dict. Am. Biog., III, 26.

Attorney General Brewster promised vigorous prosecution, but he was faced with difficulties created by the wiles of able defense counsel and by powerful friends of the accused. District Attorney Corkhill suddenly permitted the grand jury sitting in the District of Columbia to be dismissed. Indictments for the frauds most clearly shown by the evidence then seemed impossible, because the statute of limitations would bar the prosecutions before the grand jury sat again. Attempts were made to prosecute by information rather than indictment, but without success.

Indictments were eventually secured for other similar offenses, but still the government was heckled and impeded at every point. Dorsey delayed the trial by failing to appear. His bail was ordered forfeited, but when he finally appeared the order was set aside. The indictment against Rerdell was dismissed because his initials were used instead of his full name, and it was necessary to begin all over again. The trial was set for May 4, 1882, then delayed by motions to quash on the ground that some of the parties to the conspiracy were government officials clothed with an administrative discretion not subject to question by the courts. When this failed, it was discovered that defendant John W. Dorsey was absent. The case was again adjourned. At last the trial got under way in June,<sup>19</sup> with Bliss, Ker, and Richard T. Merrick in charge. The eloquent Robert G. Ingersoll led the defense. Attorney General Brewster followed the case closely, was present in court much of the time, and made the closing argument for the United States.

There were jury fixers in Washington. Apprehensive, the Attorney General or his nephew, Brewster Cameron, who was General Agent of the Department of Justice, secretly employed F. H. Fall to detect attempts to corrupt jurors. Fall wrote to Brewster Cameron that he had a means for insuring the government against the acquittal of the defendants. "I am certain," he declared, "that I can control two (2) men on the Petit Jury if I can have placed at my disposal (3 or 4) three or four 'clerkships' under the patronage of some *Senator* that you can be safe to deal with and who will not go back on me." Cameron sent the letter to the Attorney General. "Best dispense with

<sup>19</sup> For the chronology of events, see the *Annual Encyclopaedia* (1882), 753 *et seq.*



his services," he wrote, "as the gov't cannot retain in its employ any one who even suggests that an attempt be made to control a jurymen." Fall was dismissed, but no service was done the government's case by the rumors that were set afloat.<sup>10</sup>

The jury found two unimportant defendants not guilty. Rerdel and another were convicted. No agreement was reached as to Brady, the Dorseys, and the rest. There followed attempts to run down and prosecute those who it was alleged had tried to tamper with the jury. Both Bliss and the Attorney General wrote to the President naming federal officers who had in various ways tried to interfere with the conduct of the government's case.<sup>11</sup> The marshal of the District of Columbia, they said, had been negligent in the performance of his duties, had abused counsel for the United States, and had declared that the government had no case. The postmaster of Washington, the President was informed, had been guilty of irregular conduct, had denounced government counsel in his Michigan newspaper, and had also declared that the government had no grounds for prosecution. The public printer, it was said, had been responsible for articles in a local newspaper abusing the court and government counsel.

Brewster was satisfied that those indicted in the star route cases were guilty and merited the extreme punishment of the law. They had perverted millions to their private gain, they were traitors to social and official duty, and they were public enemies. "Some portions of this community, who surround these defendants, and who have enjoyed, or do still enjoy minor official positions, know no allegiance to any one but this band of robbers, and render no service to anyone but these evil employers," declared Brewster. "From motives of gain, or other corrupt considerations, they are saturated with affinities for these bad men, and they have contributed, by every means in their power, at the bidding of their masters, to obstruct public justice, and to defame its officers, with the hope of securing the acquittal and escape of the worst band of organized scoundrels that ever existed since the commencement of the government." <sup>12</sup>

<sup>10</sup> Fall to Cameron, July 12, 1882, D. J. Ms.

<sup>11</sup> Affidavit of Dickson, Aug. 23, 1882, *ibid.* See Bliss to Pres., Nov. 11, 1882, *ibid.*; Brewster to Pres., Nov. 24, 1882, Ex. and Cong. Letter Bk. L, 372.

<sup>12</sup> Brewster to Pres., Nov. 24, 1882, Ex. and Cong. Letter Bk. L, 372.

President Arthur removed the petty officials so denounced. Preparations were made for a new trial. Among defense counsel now appeared William A. Cook, whom the government had employed in the investigation and who had resigned at the change of administration. Brewster remarked that the star route culprits had used their plunder to buy up ex-counsel for the government."<sup>23</sup>

At the second trial Rerdell confessed and gave evidence, but doubt was cast on his credibility by the shifting positions he had taken. Yet his testimony was obviously damaging to the Dorseys, Brady, and others. The trial dragged wearily on through several months, attracting less and less attention. The public was no longer interested in these old scandals. The Attorney General did not appear. Again it was suggested that the jury had been "fixed." "<sup>24</sup> This time none of the defendants was found guilty.

The outcome had its ridiculous aspect. Rerdell, who had been granted a new trial, had confessed. Yet he too was acquitted. "But if he did not conspire, he must have been committing perjury of a deliberate, heinous, and also unnecessary kind," wrote the sarcastic editor of the *Nation*. "Fortunately, Brady and Dorsey are determined to let no guilty man escape, and as they have the sympathy of the District and its press, they will no doubt take the proper steps to bring Rerdell to justice." "<sup>25</sup>

The Department of Justice now secured an indictment against William Pitt Kellogg, former carpetbag governor of Louisiana, for receiving money under the mail contracts while holding the office of United States Senator. Ker, who drew the indictment, retired from the case. Merrick, making protestations of ill health, displayed reluctance to go on. Bliss, upon whom the Attorney General had relied heavily in the earlier cases, made so much trouble over his fee that his services were terminated. After running a gauntlet of demurrers and pleas, the government brought the case to trial. The judge ruled that this prosecution came too late, since the statute of limitations had run, and directed the jury to find Kellogg not guilty.

Brady was indicted for receiving bribes while holding the office

<sup>23</sup> Brewster to Cook, Mar. 17, 1882, Instr. Bk. L, 385; *The Nation*, July 5, 1883.

<sup>24</sup> See affidavit of Nelson, Mar. 7, 1884, D. J. Ms.

<sup>25</sup> *The Nation*, June 21, 1883.

of Assistant Postmaster General, but the case was postponed from year to year without action. The impression got about that the cases merely provided substantial incomes for special counsel. Congress ordered an investigation of expenditures in the Department of Justice. This brought out many details of the struggles over star route matters but performed no more useful function than to put the records in permanent form and to provide ammunition for the ensuing political campaign."<sup>66</sup>

The Department of Justice sought to recoup government finances to some extent by civil suits to recover money paid upon fraudulent mail contracts. The old difficulties recurred. Evidence had to be gathered in distant and thinly settled localities, and government counsel had to function in courts where juries were more sympathetic with local contractors than with strangers representing far-off Washington. In occasional instances the United States recovered its money, but for the most part the outcome was failure. There was a house cleaning in the Post Office Department and a thorough overhauling of the system of handling mail deliveries. The star route cases had written a dismal page in American history.

In addition to the mails, the property and lands of the United States required some activity in the West, for with respect to these the United States was not merely sovereign but was landlord as well. The lands themselves were administered by the Interior Department. Although this resource was apparently so plentiful that the principal problem seemed how best to give it away, the administrators from time to time required legal services in the defense and prosecution of land cases."<sup>67</sup> The most widespread activity of the federal government in the latter half of the century was, however, the desultory struggle to preserve the public forests—an effort that was to be significant and illuminating in a day of dust and advancing desert."<sup>68</sup>

The wooded hills of song and story lost their live oak and red cedar, so necessary in the building of ships. "There is no statute,"

<sup>66</sup> House Misc. Doc. 38, 48 Cong. 1 Sess.; see also Sen. Ex. Doc. 156, 48 Cong. 1 Sess.

<sup>67</sup> See *infra*, Chs. XIX and XXIII.

<sup>68</sup> See *A National Plan for American Forestry* (1933), Sen. Doc. 12, 73 Cong. 1 Sess., and, on the more recent and related problem, *The Western Range*, Rep. of Sec. Agriculture in Response to Sen. Res., Sen. Doc. 199, 74 Cong. 2 Sess. (1936).

wrote Attorney General Rush in 1816, "which reaches the case of cutting timber from the publick lands, as a specifick offence." <sup>10</sup> In 1817 Congress authorized the President and the Secretary of the Navy to set aside reserves of live oak and red cedar lands for future naval use, and at the same time the cutting of such timber on reserved or any other public lands was made a crime. There was a desire to protect other kinds of timber, but there was concern lest sweeping legislation retard the settlement of the West; and in 1818 Attorney General Wirt was given the task of framing a suitable statute. Congress extended the system of naval reserves, authorized the President to use the army and navy to prevent timber depredations in Florida, and in 1831 prohibited the cutting of all kinds of timber from all federal lands. <sup>11</sup>

There were some prosecutions under these statutes, supervised by the Solicitor of the Treasury until in 1858 the land office of the Department of the Interior took over this work through the registers and receivers of the district land offices. First the Treasury and later the Interior Department reported violations to the district attorneys. While the land office complained that the depredations had ripened into privilege, it rejoiced at the same time that the "efficiency" of this system had removed serious complaint, adding also that it had resulted in the general arrest of the evil, a purely gratuitous conclusion. <sup>12</sup>

As a matter of fact, there was need of legislation permitting the purchase of timber, but Congress provided none and hence timber was taken as required by settlers and others. In some sections of the country enforcement had never been known. Hampered by lack of funds, insufficient personnel, and inadequate legislation, the land office despaired. Its commissioner in 1875 and 1876 recommended that the timber be sold, since it could not be conserved, and later advised that the lands themselves be given over to private ownership to

<sup>10</sup> Rush to Sec. Treas., Nov. 28, 1816, A. G. Ms.

<sup>11</sup> 3 Stat. 347, Mar. 1, 1817; Dick to Crawford, July 1, 1818, and notation thereon by Crawford, A. G. Ms.; 3 Stat. 607, May 15, 1820; 3 Stat. 651, Feb. 23, 1822; 4 Stat. 242, Mar. 3, 1827; 4 Stat. 472, Mar. 2, 1831; 4 Stat. 646, Mar. 2, 1833; but see 5 Stat. 611, Mar. 3, 1843.

<sup>12</sup> *U. S. v. Briggs*, 9 How. 351 (1850); McClelland to Sol. Treas., Sept. 8, 1853, Jud. Letter Bk. No. 2, Dept. Int., 1; Cong. Globe, XLIX, Pt. 2, 33-40; Land Office Rep. 1876, 19.

prevent waste. Here were the beginnings of a policy which was to come to sharp issue in the opening years of the next century."<sup>22</sup>

In 1878, for building, agricultural, mining, or other domestic purposes Congress permitted the cutting of timber from lands not suitable for agriculture; such timber lands might also be purchased. But it was too late to halt the rising tide of timber depredations. Moreover, when timber thieves were caught, the land office merely required that the lands be purchased, and at least twelve times in the next years it recommended the repeal of the new laws."<sup>23</sup>

Criminal prosecutions were undertaken by the Department of Justice. The timber agents of the land office reported to the Secretary of the Interior, who referred the cases to the Attorney General. He in turn requested the district attorneys to prosecute. The district attorneys and marshals, even though they perceived violations of the law, could not act save with the permission of the Secretary of the Interior, a system rendered especially cumbersome by the slow mails of the time. Federal officers were finally authorized to proceed upon their own discretion in Alaska and Michigan."<sup>24</sup>

The cases grew in numbers until they reached a peak in the late 1880's. Attorney General Garland urged the district attorneys to even greater efforts. Attorney General Miller, who succeeded Garland in 1889, found many weak cases, many gathering dust in the files of the courts, many defeats in criminal prosecutions, and trifling recoveries in civil suits. He called upon the Secretary of the Interior for suggestions. To the district attorneys he denounced proceeding by "desultory advances" and urged that small cases be dropped. "I can almost say," he wrote, "that a bold blunder would be better than the present drifting course." He urged care to select good cases; success, said he, deterred others but defeat brought the United States into disrepute. Olney, who succeeded Miller in 1893, for a while fol-

<sup>22</sup> Land Office Reps. 1875, 9, 11; 1876, 20; Huston to Pierrepont, Aug. 9, 1875, D. J. Ms.; and see *infra*, Ch. XIX.

<sup>23</sup> 20 Stat. 88 and 89, May 31 and June 3, 1878; 27 Stat. 348, Aug. 4, 1892; McCord to Lewis, Sept. 30, 1878, D. J. Ms.; Hibbard, *History of the Public Land Policy* (1924), 466.

<sup>24</sup> Schurz to Devens, July 16, 1878, D. J. Ms.; Devens to Lewis, July 18, 1878, Instr. Bk. H, 196; Lewis to Devens, July 22, 1878, D. J. Ms.; Brewster to Zabriskie and Tidball, Mar. 24 and July 12, 1884, Instr. Bks. P, 238, and Q, 17; Garland to Ball, Atkins, and Stone, Dec. 8, 1885, and Feb. 1, 1886, Instr. Bk. T, 101, 353; Garland to Jones, Dec. 21, 1885, *id.*, 183.

lowed the same course, and then the litigation slipped back into the old routine.\*\*

The evil of petty prosecutions was in great part due to the vicious fee system by which federal officers in the field were paid not by the success or magnitude of their tasks but by the number of cases. As a result, the large operators were left untouched, and the unimportant offenders were subjected to fines, forfeitures, and costs. In some localities, prosecution became a flourishing business; the same persons appeared as witnesses, affiants, and defendants. The courts imposed few and only nominal fines. Finally Attorney General Garland requested the district judges to permit their commissioners to issue no more warrants except where approved by the district attorney. This relieved the situation.\*\* Many cases were dismissed or compromised.

Congress finally wiped out certain kinds of timber cases for violations prior to March 1, 1879. The legal position, as characterized by one district attorney, "permits the rich to buy the lands and forces the poor into the county jails." Attorney General Devens of Massachusetts, whom President Hayes had appointed in 1877, indignantly pointed out that defendants could not even be forced to buy the lands, and suggested compromise. The Secretary of the Interior wished only to prevent further depredations and to secure damages for waste and loss of United States property, although the Attorneys General at times refused to allow compromises in criminal cases when there was wilful or intentional violation of law.\*\*

The trial of cases was hindered by the difficulties of securing neighbors to bear witness against one another. Few witnesses were

\*\* Garland to Jones, Dec. 8 and Oct. 2, 1885, Instr. Bk. S, 102, 468; Miller to Sec. Int., Feb. 11, 1890, Ex. and Cong. Letter Bk. W, 93; Miller to Elstner, Sept. 30, 1890, Instr. Bk. No. 6, 183; Miller to Hay, May 11, 1892, Instr. Bk. No. 21, 488; Olney to Wheeler, June 3 and Aug. 18, 1893, Instr. Bk. No. 30, 328; *id.*, No. 32, 252.

\*\* Devens to Mayer, Nov. 21, 1879, Instr. Bk. I, 423; Mayer to Devens, April 4, 1880, D. J. Ms.; Smith to Devens, Oct. 28 and 29, 1880, *ibid.*; Schurz to Devens, April 9, 1880, *ibid.*; Denson to Garland, Nov. 20, 1885, *ibid.*; Garrison to Sparks, Sept. 21, 1886, *ibid.*; Lamar to Garland, Oct. 30, 1886, *ibid.*

\*\* 21 Stat. 237, June 15, 1880; Smith to Devens, Oct. 29, 1880, D. J. Ms.; Devens to Smith, Nov. 18, 1880, Instr. Bk. K, 304; Devens to Mayer, Dec. 5, 1878, Instr. Bk. H, 421; MacVeagh to Sec. Int. and Sol. Treas., June 28 and Aug. 25, 1881, Ex. and Cong. Letter Bk. J, 465, 554; Miller to Hayt, July 18, 1901, Misc. Letter Bk. No. 48, 67; Miller to Sol. Treas., Oct. 7, 1890, Ex. and Cong. Letter Bk. No. 3, 313; Olney to O'Neal, Oct. 20, 1893, Instr. Bk. No. 34, 114; Stockslayer to Vilas, and Vilas to Garland, Jan. 22 and 23, 1889, D. J. Ms.

concerned at the loss of federal property and many were not beyond suspicion themselves. Distance was a serious factor. The federal courts met as much as four hundred or, as District Attorney Smith of Idaho put it, "1000 miles asunder, over the most difficult staging, on pioneer roads." Sometimes both courts and officers were without operating funds. Offenders, when the law finally got in motion, could flee to other states."

Moreover, since the timber agents of the Interior Department had to approve cases and there were often no such agents in whole territories, the district attorneys were unable to proceed. Pleas for agents were seldom successful, and the agents themselves were often incompetent or corrupt. Nevertheless, Attorney General Harmon wrote, "whoever is to blame, it reflects no great credit on this Department." In far-off Alaska, where the natural heritage still seemed inexhaustible, strict judicial interpretation of the law forced the dismissal of all timber cases."

When the forests began to be stripped not by individual settlers but wholesale by lumber companies, railroad corporations, and other commercial interests, there was some change of sentiment in the West.<sup>40</sup> These interests could fight back, as was well illustrated by the suit of the United States against the Sierra Lumber Company of California. This company was organized in 1878, its depredations reported by an agent of the Interior in 1884, and referred to the Department of Justice in 1885. Suit was instituted in April 1886, a verdict for the United States reached in January 1889, and the judgment ultimately compromised in 1892. The action had been brought for the cutting of sixteen thousand trees, producing over sixty-four million feet of lumber and representing a cash value of \$2,240,000.

<sup>40</sup> Coghlan to Devens, Oct. 25, 1877, *ibid.*; Teare to Devens, Feb. 12, 1880, *ibid.*; Huston to Devens, April 25, 1878, *ibid.*; Smith to MacVeagh, April 8, 1881, *ibid.*; Hilborn to Garland, Jan. 29, 1886, *ibid.*; Garland to Jones and McComb, May 27, 1886, Instr. Bk. V, 231, 235.

<sup>41</sup> Harmon to Wolfe, Jan. 10, 1896, Instr. Bk. No. 61, 144; Miller to Sec. Int., Sept. 22, 1892, Ex. and Cong. Letter Bk. No. 11, 101; Brewster to Teller, Jan. 17, 1883, Ex. and Cong. Letter Bk. L, 538; McKenna to Sec. Int., June 4 and 22, 1897, *id.*, No. 31, 281 and 405; Devens to Duskin, Mar. 5, 1878, Instr. Bk. G, 760; Brewster to Lewis, Nov. 7, 1883, Instr. Bk. O, 343; Miller to Sec. Int., Mar. 12, 1890, Ex. and Cong. Letter Bk. W, 197; Acting Atty. Gen. to Winston, Aug. 23, 1891, Instr. Bk. No. 15, 66. *Alaska*: Miller to Sec. Int., Aug. 7, 1891, Ex. and Cong. Letter Bk. No. 6, 440; Acting Atty. Gen. to Sol. Treas., Aug. 14, 1891, *id.*, 481.

<sup>42</sup> Devens to Schurz, Feb. 3, 1879, Ex. and Cong. Letter Bk. G, 664.

The final verdict for the government was for \$41,000; and the compromise, accepted by the United States in order to avoid a new trial, was for \$15,000 plus the costs of the suit.

Special counsel had been appointed by Attorney General Garland, at the suggestion of and named by Secretary of the Interior Lamar; but the original survey and report by the Interior agent proved to be inaccurate, and the amount of recovery by the United States was further limited through inability to prove that the trespass was wilful. The Department of the Interior had refused to consider the first suggestion by special counsel for a compromise; and the result was an expensive resurvey and trial, with ultimate compromise for the amount originally suggested by special counsel Oates. It could hardly be termed a victory.<sup>41</sup>

More striking were the activities of the western railroads, which Congress had rewarded for their enterprise with huge grants of public land. For example, the activities of the Northern Pacific ranged through two states and three territories. Incorporated by an act of Congress on July 2, 1864, it was granted twenty miles of non-mineral public land through the territories and ten miles of such land through the states on each side of its line. The President of the United States was to have the lands surveyed for forty miles on both sides of the entire line of the road<sup>42</sup>—which unfortunately was not undertaken.

Timber along the right-of-way was needed in the construction of the road, and the statute permitted it to be so taken. The railroad had been granted only alternate odd sections of land on each side of the line. Timber was cut, however, from both the odd and even sections for other than construction purposes, and the railroad purchased quantities of timber from individuals who cut from the ungranted public lands.

The Montana Improvement Company, organized and controlled by the railroad, supplied all materials made of timber during construction for a distance of some nine hundred and twenty-five miles.

<sup>41</sup> The correspondence, all in D. J. Mss., covers the period from 1885 to 1892 and reveals friction between subordinate officers and charges of misconduct against the district attorney and special counsel.

<sup>42</sup> 13 Stat. 365, Sec. 6, July 2, 1864.



It had secured, by arrangement with the railroad, the control of all the timber on the railroad lands, and in addition claimed control of all the timber on adjacent government lands.

Early in 1884 Attorney General Brewster wrote to Secretary of the Interior Lamar, calling his attention to this state of facts. Lamar, in the usual course, requested the general land office to have its agents make full investigation and in addition asked the Attorney General to take legal measures to put a stop to these depredations. It was not until the middle of the next year that Attorney General Garland sent letters of instruction to the district attorneys in Montana, Idaho, and Washington Territory.<sup>44</sup>

It was the government's theory that, until the grant had been surveyed, no rights accrued to the railroad even for the odd numbered sections, except for timber needed in actual construction. The railroad, on the other hand, maintained that, until the land was surveyed, it could cut indiscriminately. Moreover, since the land was not surveyed, it was almost impossible for the government to prove from whose land the timber had been cut.

Both civil and criminal proceedings against the Montana Improvement Company were filed but never came to trial. The cutting had taken place early in the 1880's and witnesses could not be found. Furthermore, much of the timber was actually used for lawful purposes. Principally, however, it could not be shown that the timber had been cut from public lands. The suits were finally dismissed.<sup>45</sup>

Numerous other proceedings had been commenced in the meantime against the railroad and individual cutters. None of these was successful. There was much dissatisfaction, and under the lead of Special Assistant Attorney Henry W. Hobson it was determined to change the strategy of the government. "Shelling the woods all along the line, bringing suits throughout Montana, Idaho, and Washington in every district through which the Railroad runs," Hobson

<sup>44</sup> Brewster to Lamar, Feb. 2, 1884, Ex. and Cong. Letter Bk. N, 218; Lamar to McFarland, July 25, 1885, D. J. Ms.; Lamar to Garland, July 27, 1885, *ibid.*; Garland to Allen, July 30, 1885, Instr. Bk. S, 237.

<sup>45</sup> Weed to Miller, Feb. 20, 1891, D. J. Ms.; Carter to Chandler, Oct. 30, 1891, *ibid.*; Chandler to Miller, Nov. 6, 1891, *ibid.*; Weed to Miller, Nov. 21, 1891, *ibid.*; Sweet to Miller, Aug. 20, 1889, *ibid.*

was convinced, was unwise. He persuaded Garland and the district attorneys, and the remaining cases were dismissed. In their place, a single suit in equity was filed in a federal court in Minnesota to include the entire line of the road from Minnesota to the Pacific.<sup>45</sup>

The case made little or no progress, and Attorney General Miller, who succeeded Garland, came to the conclusion that the new idea had been a mistake. "We have met nothing but defeats in Montana," he wrote to the Secretary of the Interior. "A series of entanglements has resulted from which we have not yet extricated ourselves; it seems to me one step toward extrication would be a vigorous cutting off of all suits which present no reasonable chance of recovery."<sup>46</sup>

The old method of handling the Northern Pacific depredations was resumed, except that Miller constantly urged greater care as to the proof before suit was instituted. Shortly thereafter Commissioner Carter of the land office asked that District Attorney Weed of Montana be permitted to come to Washington to discuss the possibility of the United States and the railroad joining as co-complainants in timber trespass suits against individual cutters. Such a plan was worked out, but almost at once Senator Thomas C. Power of Montana suggested that no such action be taken. "Permit the Northern Pacific to fight their own battles," said he. To join with the railroad, he thought, would injure the chances of a possible survey of the Northern Pacific lands and would enable the railroad to dodge taxes.<sup>47</sup>

"The unsurveyed lands," replied Miller, "are being plundered, and, whenever the United States prosecutes, the claim is made that the lands belong to the railroad company, and when the railroad company prosecutes the claim is made that they belong to the United

<sup>45</sup> Hobson to Garland, Sept. 6, 1888, *ibid.*; Acting Atty. Gen. to Sec. Int., May 8, 1890, Ex. and Cong. Letter Bk. No. 1, 54.

<sup>46</sup> Miller to Sec. Int., Mar. 4, 1891, Ex. and Cong. Letter Bk. No. 5, 218; Miller to Weed, April 18, 1891, Instr. Bk. No. 11, 464. William Henry Harrison Miller (1840-1917) was born at Augusta, New York, studied law while serving as superintendent of schools in Peru, Indiana, and practiced his profession in Indianapolis. He was appointed Attorney General by President Harrison in 1889, in whose law firm he had been a partner, and rejoined the firm when Harrison's term ended in 1893, engaging in active practice until 1910. Dict. Am. Biog., XII, 643.

<sup>47</sup> Carter to Miller, Dec. 23, 1891, D. J. Ms.; Power to Miller, April 6, 1892, *ibid.*; Miller to Power, April 6, 1892, Ex. and Cong. Letter Bk. No. 9, 183.

States. It seemed, therefore, advisable to devise a plan, which, like that of the coon hunter, would 'ketch him a comin or a goin.' " Certainly, he ended, "it is my duty to prevent any undue destruction of the timber land of the Government."

Senator Power was not satisfied. The Northern Pacific was the "coon" that ought to be caught, and he proposed a bill to provide for a survey. Any action taken at this time, he felt, might have a tendency to prevent Congress from making proper appropriations for this purpose. Miller failed to answer; but when Senator Power wrote again, Miller directed District Attorney Weed to delay all action until further advised. Senator Power's bill was never voted upon, and it was not until 1895 that Attorney General Olney once again recommended joint action by the railroad and the United States.<sup>44</sup> Intermittent proceedings during the next ten years led to no outstanding success. By 1901 most of the lands had been surveyed, but the damage had been done.<sup>45</sup>

The government met more success farther east, in Alabama. There lands, originally destined for a railroad never completed, constituted the richest timber areas in the state. The depredations of sawmill and lumber companies were so great and the fraud so bold that, despite the doubts of the Secretary of the Interior,<sup>46</sup> action of some sort was inevitable. District Attorney Lewis E. Parsons and Marshal B. W. Walker were men of sufficient determination. They repeatedly requested and finally received authorization to proceed.<sup>47</sup> On February 18, 1890, Federal Judge Pardee handed down an order restraining the lumber interests from removing timber, logs, or lumber. He also directed the marshal to take possession of the lands

<sup>44</sup> S. 1774, 52 Cong. 1 Sess.; Power to Miller, April 7, 1892, D. J. Ms.; Power to Miller, April 14, 1892, *ibid.*; Miller to Power, April 13, 1892, Ex. and Cong. Letter Bk. No. 9, 248; Acting Atty. Gen. to Weed, April 14, 1892, Instr. Bk. No. 21, 75; Olney to Sec. Int., Feb. 19, 1895, Ex. and Cong. Letter Bk. No. 20, 583; Olney to Leslie, Feb. 20, 1895, Instr. Bk. No. 48, 228.

<sup>45</sup> Closely connected with the attempt on the part of the United States to stop timber depredations on the lands granted to the Northern Pacific Railroad Company were proceedings to cancel patents to that company on the ground that they were fraudulently issued or that they covered mineral lands. Garland to White, Dec. 30, 1887, Instr. Bk. Y, 406; *U. S. v. Northern Pacific R. Co.*, 152 U. S. 284; 177 U. S. 435; 193 U. S. 1; 223 U. S. 746; 256 U. S. 51.

<sup>46</sup> 11 Stat. 17, June 3, 1856; Schurz to Devens, Oct. 16, 1879, D. J. Ms.; Garland to Denson, Feb. 10, 1886, Instr. Bk. T, 391.

<sup>47</sup> Parsons to Miller, 1889, D. J. Ms.; Noble to Miller, Sept. 12, 1889, *ibid.*; Miller to Parsons, Sept. 30, 1889, Instr. Bk. No. 4, 530.

and timber, and fixed a date for a hearing the next month to determine whether or not a formal receiver should be appointed.

Marshal Walker and ten deputies went to work. They seized logs, rafts of timber, sawmills, and lumber. They placed booms across rivers flowing out of the state. They moved swiftly, and when there was doubt whether the timber had been cut from public lands, they nevertheless seized it pending adjudication. The lumber business came to a standstill. The newspaper headlines read, "Situation Serious!"<sup>88</sup>

Parsons had his hands full. The lumber interests were large and powerful. They sent delegations to see Judge Pardee, first to try to get the booms lifted from the rivers, and later to force the appointment of a suitable receiver. Parsons and Walker both asked that Attorney General Miller provide a special assistant or that he come himself, but they were left to act alone.<sup>89</sup> They feared that Judge Pardee would not appoint a favorable receiver. "Hope you will direct such a message to him as will give him nerve," wired Walker. "Of course I am anxious for impartial receivers, and this you can represent to the Judge," replied Miller. "What more can I do?"<sup>90</sup>

Judge Pardee granted the injunction asked by the government and appointed Marshal Walker as receiver. It looked as though the government would not only recover a large sum of money, but would deal an irreparable blow to timber thieves throughout Alabama and Florida. But this was not to be. The lumber people carried the battle to Congress. There a measure passed confirming in part the old railroad claim to the lands.<sup>91</sup>

During the late '90's timber depredations dwindled in the face of the growing conservation movement. Aside from actions based on frauds in Indian contracts, great numbers of suits to set aside land patents, and proceedings to remove squatters and to prevent fencing of the public domain, the lousy West was left to order its own justice. There were still the far territories of Hawaii and Alaska to consider, and after the Spanish War an Insular Bureau was established in the

<sup>88</sup> Walker and Parsons to Miller, Feb. 25 and 27, Mar. 2 and 3, 1890, D. J. Mss.

<sup>89</sup> Parsons to Miller, Feb. 25 and Mar. 2, 1890, *ibid.*

<sup>90</sup> Walker and Parsons to Miller, Mar. 3 and 6, 1890, *ibid.*; Miller to Parsons, Mar. 6, 1890, Instr. Bk. No. 6, 138.

<sup>91</sup> 26 Stat. 496, Sept. 29, 1890.

Department of Justice to deal with novel questions arising from "possessions" as distinguished from territories.

Alaska, since its purchase in 1867, had been a constant source of trouble. There was a lack of adequate government. The laws of Oregon and of the United States were finally applied; but liquor regulations were openly violated, fishing and sealing were uncontrolled, timber and mining depredations were frequent, and the territory became a refuge for the desperate. In short, the history of the Indian Territory was repeated. Legal processes, ill-suited to the West, were mockeries in the far North. The "gold rush" in 1898 naturally made matters worse. Federal marshals and commissioners carried the abuses of the fee system to new lengths. There was no effective police system. The few courts were saddled with administrative rather than judicial duties while, as Attorney General Moody reported in 1904, "the governor, upon whom these powers and duties should logically fall, has nothing specific to do except to make annual reports, issue Thanksgiving Day proclamations, and appoint Indian policemen and notaries public." <sup>86</sup>

Until the World War, the Presidents and the Attorneys General were constantly searching for capable officers and removing the dishonest and inefficient. "It seems well nigh impossible ever to be sure that we have got a decent man in Alaska," said President Roosevelt to Attorney General Bonaparte in 1908. "The selection of judges for that territory," wrote Attorney General Wickersham in 1909, "is the most difficult task I have had to deal with." <sup>87</sup> Moreover, as had been true in the territories of the West, there were constant feuds between the federal judges, attorneys, marshals, and commissioners. Charges and counter-charges flew thick and fast.

In Alaska, the "court on wheels" of the Indian Territory found a counterpart in a court on a boat during the summer season. The adaptability of the law was there illustrated with respect to the desti-

<sup>86</sup> *Insular affairs*: Ann. Reps. Atty. Gen. 1899, 29; 1901, 19, 35; 1902, 24; 1905, 13; 1929, 52; 1932, 101; 1933, 88. *Statutes*: *Id.*, 1884, 15; 1897, 9; 1898, 19; 1911, 85. *Police and enforcement*: *Id.*, 1899, 42; 1904, 16. *Juries and the fee system*: *Id.*, 1891, 26; 1892, 22; 1904, 15. *Courts and government*: *Id.*, 1897, 9; 1898, 19; 1904, 14. *Jails*: *Id.*, 1909, 68; 1910, 70.

<sup>87</sup> Roosevelt to Bonaparte, Dec. 21, 1907, and Feb. 10, 1908, Roosevelt Papers and Bonaparte Papers, Lib. Cong.; Wickersham to Gilbert, April 2, 1909, D. J. Pers. Files, Alaska.

tute, the frozen, and the wounded. These unfortunates were charged with vagrancy, so that they might receive medical and surgical attention at the expense of the United States. Attorney General Wickersham repeatedly called the attention of the judges, district attorneys, and marshals to this irregular practice. They answered, "What other course is open?" "

" Ann. Rep. Atty. Gen. 1910, 35, 71-72.

## CHAPTER XIV

### PASTURE FOR THE IRON HORSE

FOR many years, Congress and the executive sought to link the East and West by railroad. These good intentions loosed a multitude of troubles. The United States gave land and loaned money which the new railroads accepted and then engaged in such a struggle with the government as had not been seen since the time of Jackson and the Bank of the United States.

During the trying days of the Civil War, Congress took time to charter the Union Pacific Railroad and provide it with lands and money. Similar grants were made to the Central Pacific, a California corporation already in existence. One line was to build westward, the other eastward. They met near Ogden, Utah, in 1869.<sup>1</sup> While the original construction was under way, questions arose as to payments by the United States and the completion of portions of the road. "The Pacific Railroad folks are here in force," wrote Secretary of the Navy Welles in his diary in 1868. "Do not like any checking-up on their subsidies." <sup>2</sup>

The usual method of building railroads was to let liberal contracts to construction companies in which the railroad managers had substantial interests; and thus the promoters enriched themselves, whatever the ultimate economic fate of their railroads might be. This was the method of the Central Pacific and the Union Pacific.<sup>3</sup> The Union Pacific's construction company was called the "Credit Mobilier," promoted by the vice president of the railroad. Ultimately, both the construction company and the railroad came under the domination of two members of the New England firm of Oliver

<sup>1</sup> 12 Stat. 489, July 1, 1862; 13 Stat. 356 and 504, July 2, 1864, and Mar. 3, 1865; 14 Stat. 20, 79, 289, 355, 367, April 7, July 3, 26, and May 7, 1866; 15 Stat. 39, 245, 324, 348, Dec. 20, 1867, Mar. 6, 1868, Mar. 3, 1869; 16 Stat. 56, 121, 305, 430, April 10, 1869, May 6, July 15, 1870, Feb. 24, 1871.

<sup>2</sup> 11 Op. 183; 11 Op. 188; 11 Op. 414; 12 Op. 477; *Welles Diary, op. cit.*, III, 472, 474.

<sup>3</sup> Daggett, *Chapters on the History of the Southern Pacific* (1922), 70 et seq.

Ames & Sons, which had garnered wealth during the war by the manufacture of shovels and swords.

Oliver Ames became president of the Union Pacific, and his brother, Oakes Ames, dominated the Credit Mobilier which drained away the financial resources of the railroad. As a member of Congress Oakes Ames was in a position to care for the legislative welfare of this combination. Finally, fearing investigations or interference which might be troublesome, he undertook to distribute shares of Credit Mobilier stock among his fellow legislators for a small part of their value. Even then "payment" was sometimes made through accumulated dividends so that the "purchasers" were required to make no cash outlay.

These methods of financing were matters of some knowledge and more suspicion during 1868. There were numerous discussions in the cabinet. Although the railroad managers had received seventeen millions more than they had expended, they were "distressed for more money." Attorney General Evarts, Secretary Welles noted in his diary, "talks like an attorney for them."<sup>4</sup>

At the special session of Congress at the beginning of the Grant administration, the activities of the Credit Mobilier were exposed in debate on the floor of the Senate. Finally, Congress directed the Attorney General to investigate and determine whether or not the charter and the franchises of the Union Pacific and Central Pacific railroad companies had been forfeited, whether the companies had paid illegal dividends upon their stock, and whether their directors, agents, or employees had violated any penal law. The Attorney General was authorized to institute appropriate civil or criminal proceedings.<sup>5</sup> Senator George H. Williams of Oregon, who was later to be Attorney General, opposed this measure. To him the paramount consideration was that the railroad should be built. The fact that there were quarrels among builders and financiers, he thought, should not be permitted to result in government action which might destroy the credit of the roads.<sup>6</sup>

<sup>4</sup> *Welles Diary, op. cit.*, III, 474 and see 425, 439, 444, 449, 460, 485, 490, 571.

<sup>5</sup> Cong. Globe, 41 Cong. 1 Sess., 533 *et seq.*, 536; 16 Stat. 56, Sec. 4, April 10, 1869.

<sup>6</sup> Cong. Globe, 41 Cong. 1 Sess., 671, 676.



In the meantime, the Grant administration had brought into office Attorney General E. Rockwood Hoar. He wrote Senator Davis of Kentucky, who had been responsible for drafting the resolution, to find out just what it meant. "I must presume that something specific was in the mind of its author," said Hoar, "and desire to waste no time in coming as directly as possible to the point contemplated." <sup>7</sup> However, no action against the railroads was taken, and it was not until the political campaign of 1872 that sufficient disclosures were made to force effective congressional investigation. As a result, extensive ramifications of graft and fraud were made apparent.

Grant had meanwhile dismissed Hoar and selected Akerman in his place. The government loans to the railroads were to be repaid in thirty years, with interest computed semi-annually. The companies interpreted the statutes to mean that the interest was to be paid at the end of the thirty-year period. The government's position was that the interest fell due and must be paid semi-annually. The government also claimed that if the interest were not paid semi-annually it might withhold moneys due to the railroads for transportation services; and the Attorney General, when called upon by the Secretary of the Treasury, gave an official opinion to that effect. True, he said, the statute was not specific, but under the rules of the Supreme Court "the construction of doubtful language should be in favor of the donor." <sup>8</sup>

A few days before this opinion, a Senate resolution had directed the Committee on the Judiciary to inquire whether the companies were lawfully bound to pay interest semi-annually. After the Secretary of the Treasury had begun withholding all compensation for transportation services, an additional resolution directed an inquiry as to his power to do so. The committee, making no mention of the opinion of the Attorney General, came to the conclusion that the railroads need not pay the interest until the expiration of the thirty years and that the Secretary of the Treasury had no right to withhold moneys due for transportation services. No careful consideration was given the question on the floor of either house, but to the

<sup>7</sup> Hoar to Davis, April 22, 1869, Letter Bk. G, 449.

<sup>8</sup> 13 Op. 360, 363, Dec. 13, 1870.

army appropriation bill, signed by the President on the last day of the session, a rider was attached directing the Secretary of the Treasury to pay over these moneys. Attention was subsequently called to the fact that among the Senators voting for the provision, thus defeating the effect of the opinion of the Attorney General, was George H. Williams.\*

A few months later Akerman wrote another opinion, on the right of one of the companies to extend its line through certain territory and receive grants of land therein. The Attorney General listened to arguments of two hours each from two railroad attorneys, one of whom was his predecessor, E. Rockwood Hoar. Written arguments were submitted by former Attorney General Evarts and by former Supreme Court Justice Benjamin R. Curtis. This array did not convince Akerman. "The head of a Department should not dispose of public land or issue the bonds of the nation in aid of any enterprise, however meritorious," he said, "without an unequivocal direction from the legislature."<sup>10</sup>

The company asked for a rehearing, and Akerman agreed to a six-hour session in Washington or in New York. The company, however, failed to make further argument, and Akerman notified the Secretary of the Interior that his opinion must stand. It was said that hostility of the railroad interests was largely responsible for President Grant's letter of December 13, 1871, requesting Akerman's resignation.<sup>11</sup> Senator George H. Williams, who because of his legislative activity and his professional services was regarded as among the staunch friends of the railroads, became Attorney General at the close of 1871.

During the campaign of 1872, revelations of Credit Mobilier scandals brought the issue to the fore. The Secretary of the Treasury, still refusing to admit that there was no obligation on the rail-

\* Sen. Rep. 375, 41 Cong. 3 Sess., 6-7; 16 Stat. 525, Mar. 3, 1871; Cong. Globe, 42 Cong. 3 Sess., 578-579.

<sup>10</sup> Akerman to Delano, Sept. 5, 1871, Ex. and Cong. Letter Bk. A, 226; 13 Op. 430, June 3, 1871.

<sup>11</sup> Akerman to Delano, Sept. 5, 1871, Ex. and Cong. Letter Bk. A, 226; Akerman to Delano, Nov. 17, 1871, *id.*, 335 and see also Akerman to Ingersoll, Nov. 17, 1871, Letter Bk. I, 141; Ms. draft of article prepared for the *Cartersville Courier*, Mar. 26, 1885, by Mrs. R. A. Felton, in the possession of Judge Alexander Akerman, Tampa, Fla.

roads to pay interest until the thirty-year period for the repayment of the principal should expire, reported an accumulation of more than five million dollars interest due and unpaid. On January 6, 1873, the House of Representatives asked President Grant to employ two attorneys, under the direction of the Department of Justice, to prosecute a suit to recover this interest from sums illegally and fraudulently paid to the stockholders of the *Credit Mobilier*.<sup>17</sup>

While Attorney General Williams was selecting the two attorneys and preparing for action, Congress in response to popular indignation continued discussions of legislation to determine more clearly the rights of the railroads and the government. Many members were convinced that Attorney General Akerman's opinions had been correct.

Two important sections were inserted in the appropriation act of March 3, 1873. The Secretary of the Treasury was directed to withhold enough of the money due the railroads for services to cover the interest and five per cent of the net earnings of the roads, which, according to the original statutes, was to be paid from the time of the completion of the roads. In order that any legal rights of the companies might not be infringed, they were authorized to bring suit in the Court of Claims.

The second section was intended to protect the rights of the government by preventing the squandering of the resources of the Union Pacific. The Attorney General was directed to institute a suit in equity against the railroad and against persons who had received its stock without paying for it in full or who had received bonds, money, or lands of any of the railroads or of the United States through fraudulent contracts or other wrongful means.<sup>18</sup>

With such a positive mandate, Attorney General Williams proceeded at once to institute the suit against the *Credit Mobilier* and others, relying upon Aaron F. Perry, J. Hubley Ashton, and Thomas A. Jenckes to conduct it. He decided to proceed in the United States circuit court in Connecticut and asked Supreme Court Justice Ward Hunt, who was assigned to that circuit, to sit with Circuit

<sup>17</sup> Cong. Globe, 42 Cong. 3 Sess., 359-361.

<sup>18</sup> 17 Stat. 508 and 509, Mar. 3, 1873.

Judge Woodruff. Government counsel appeared before Justice Hunt on June 27, 1873, and sought preliminary injunctions against the Union Pacific and the Credit Mobilier to prevent further waste of resources while the main suit was pending. No counsel appeared for the defendants, and the court ordered the preliminary injunctions to issue.<sup>14</sup>

Preparation of the case continued. "My spirits concerning it are entirely cheerful and good," wrote Perry in midsummer. "I do not undervalue difficulties, but feel no discouragement." The arguments of both sides were heard before the circuit court early in October 1873, with such eminent lawyers appearing for the defense as Benjamin R. Curtis, William M. Evarts, and Sidney Bartlett. Attorney General Williams participated in the argument for the government. "Manifestly," said the *Nation*, "society, as represented by the Government, is beaten whenever it comes in contact with the great corporations, because society has allowed these corporations to secure as agents men who can outgeneral, outwork, and in any ordinary fight overcome the men who are the agents of the Government."<sup>15</sup>

Perry, however, returned home with the impression that he had been victorious. The argument on the other side had seemed to him thin and inconsistent, but as the weeks passed he showed nervousness. He worried about comments that government counsel had engaged in sharp practice in asking for the preliminary injunction, thought they might have a bad effect on the mind of the judge, and suggested that Ashton confer with the Attorney General on the expediency of a statement to the court which would correct erroneous impressions.<sup>16</sup>

His uneasiness was justified. On November 27, 1873, the case was decided in favor of the railroads. The United States, said Justice Hunt for the circuit court, was not yet a creditor, for the loans were not yet due. When due, the United States could take the road

<sup>14</sup> Williams to Hunt, May 29, 1873, Letter Bk. I, 745; Ashton to Williams, June 30, 1873, D. J. Ms.

<sup>15</sup> Perry to Williams, Aug. 25, 1873, *ibid.*; The *Nation*, Oct. 16, 1873, and see also the issue of Dec. 11, 1873.

<sup>16</sup> Perry to Williams, Oct. 6 and 29, and Nov. 5, 1873, D. J. Mss.

and its equipment. The ties, for instance, he said, "are just as valuable, whether laid by fraud and in extravagance, as if honestly and prudently laid." Gross fraud by officers of the corporation was charged, but the corporation itself should sue for that; if the United States could undertake to sue in behalf of the corporation, it would be depriving the corporation of its property without due process of law. The corporation was in no position of trust to the United States; the government was simply a donor with no more rights than specifically set forth in the original statute.<sup>17</sup>

The case was appealed to the Supreme Court, where it went to the foot of an overloaded calendar and remained for more than two years before a date for argument could be anticipated. Perry was working with zeal in the preparation of the brief. He was to have two hours for argument. The Solicitor General also was to prepare a brief. The Judiciary Committee of the House of Representatives wrote the Attorney General asking the status of the proceedings. The Chief Justice thought the case too important to be heard so near the end of the term.<sup>18</sup>

Williams had now been succeeded as Attorney General by Edwards Pierrepont, and during the summer of 1876 Pierrepont was replaced by Alphonso Taft who seemed inclined to leave the case very largely to Perry. But Perry insisted that Taft or some one else take the opening or closing argument. "It would help very much because you could make as good an argument as anybody, and the case needs it," he wrote. "It would help also in relieving me of a sense of responsibility which does not belong to my situation, and which I cannot adequately meet without that kind of support."<sup>19</sup>

Revealing the temperamental qualities which he had shown throughout the case, Perry suddenly sent in a blunt resignation. The

<sup>17</sup> *U. S. v. Union Pacific R. Co.*, Fed Cas. No. 16,598, 11 Blatchf. 385 (1873).

<sup>18</sup> Perry to Atty. Gen., Feb. 3, 1876, D. J. Ms.; Pierrepont to Perry, Feb. 8, 1876, Letter Bk. L, 124; Pierrepont to Perry, Feb. 23, 1876, *id.*, 136; Pierrepont to Knott, April 17, 1876, Ex. and Cong. Letter Bk. D, 345.

<sup>19</sup> Perry to Taft, July 7, 1876, D. J. Ms. Alphonso Taft (1810-1891) was born in Vermont, began the practice of law in Cincinnati, was appointed to the superior court of Cincinnati, became Secretary of War under President Grant, and then was transferred to the position of Attorney General (1876-1877). In 1882 he was appointed minister to Austria-Hungary by President Arthur and in 1884 was transferred to St. Petersburg, where he remained until the following year. Leonard, *Life of Alphonso Taft* (1920), and Dict. Am. Biog., XVIII, 264.

Attorney General as bluntly accepted it.<sup>20</sup> Yet when the case was finally argued, on December 13 and 14, 1876, Perry was present and took part in the argument. Soon afterward the activities of the Court were suspended while some of the justices sat as members of the electoral commission to determine who was entitled to the position of President of the United States after the election of 1876. Justice Davis resigned the following March. Early in the next term of the Supreme Court, the case was set for reargument. One of the many defendants died in January 1878, and for this and other reasons counsel for the Union Pacific asked further postponement.<sup>21</sup> The possibility that Justice Field might not be present at the beginning of the following term, because of the illness of his wife, was the occasion for much correspondence, both parties agreeing that a full bench was essential.

The presence of one new judge on the bench made it seem necessary that the entire case be reargued. The Court declined to give any indication as to particular points to be stressed. The Attorney General, now Charles Devens, notified Perry that the reargument would be presented by the Attorney General and the Solicitor General, but that recognition would be given in the brief to the labors of Perry and Ashton.<sup>22</sup> The reargument took place on November 26 and 27, 1878, just five years after the circuit court had decided the case.

Government counsel stressed heavily the sovereign rights of the United States, as well as its position as creditor. "The United States," they argued, "is not a stranger to the company, but has always been represented within it by directors appointed by the President." Furthermore, the government had the right to amend the charter. The company was not able or willing to bring and maintain suit against those who dominated it. A chief end of the cre-

<sup>20</sup> Perry to Taft, Oct. 17, 1876, D. J. Ms.; Taft to Perry, Oct. 19, 1876, Instr. Bk. G, 58.

<sup>21</sup> Bartlett to Devens, Jan. 17, 1878, D. J. Ms.

<sup>22</sup> Bartlett to Devens, Jan. 19, 1878, *ibid.*; Devens to Bartlett, Feb. 25, 1878, Letter Bk. M, 59; Devens to Perry, Nov. 25, 1878, Letter Bk. M, 227. Charles Devens (1820-1891) was born at Charlestown, Massachusetts, practiced first at Northfield and then at Greenfield, served two terms in the Massachusetts state senate, was United States marshal, city solicitor of Worcester, justice of the superior court, justice of the supreme judicial court of Massachusetts, and was then appointed Attorney General of the United States (1877-1881). Thereafter he returned to a position on the supreme court of his state. Dict. Am. Biog., V, 260.

ation and endowment of the Union Pacific was the accomplishment of governmental purposes. The endowment of the company was not a mere donation but a public trust, subject to ordinary equity jurisdiction; and a diversion of the funds of the corporation from the intended purposes was a breach of trust.

The Supreme Court, with two justices dissenting, agreed with the circuit court. It was the few honest stockholders who alone, said the Court, "suffered any *legal* injury, or are entitled to any relief." No money was yet due the United States, nor was the railroad required to account as a trustee of public funds given it. "It was a wise liberality," the Court concluded, "for which the government has received all the advantages for which it bargained, and more than it expected." As a result of the decision it became apparent that the Credit Mobilier abuses would receive no correction at the hands of the federal government."

The government had been similarly unsuccessful in its attempt to collect interest semi-annually. The Court of Claims held that the interest did not fall due until the maturity of the principal. Attorney General Pierrepont argued in vain on appeal. The Supreme Court took the same view as the Court of Claims. Indeed, it found no room for doubt. When the original act was passed, "the war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions." As to the terms, "if deemed too liberal now, they were then considered," said Justice Davis, "not more than sufficient to engage the attention of enterprising men." "

The railroads also refused to pay five per cent of their net earnings to retire in part the loans, as the statutes clearly prescribed. For the purpose of receiving the loans, the companies had claimed the completion of their roads in 1869. The statute provided that five per cent of the net earnings should be paid annually after completion, and the government sought to collect after 1869. The com-

<sup>88</sup> *U. S. v. Union Pacific R. R. Co.*, 98 U. S. 569 (1879), italics supplied. See on subsequent attempts to collect income taxes, *Douglass to Williams*, Oct. 28, 1873, and *Child to Williams*, Feb. 14, 1874, D. J. Mss.; *Devens to Sanger*, June 1, 1878, Instr. Bk. H, 122.

<sup>89</sup> *Union Pacific R. R. Co. v. U. S.*, 10 Ct. Cls. 548 (1874); *U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72 (1875).

panies failed to pay, however, arguing, when pressed to the point of making a statement, that for this purpose the roads were not completed until 1874. This situation provoked much discussion in Congress, and a statute of June 22, 1874, directed the Attorney General to sue."

Proceedings were instituted in federal courts in a number of districts. The Union Pacific brought suit against the government in the Court of Claims to recover compensation withheld by the government to cover the five per cent payments. This and a case from the circuit court in California were appealed. "It would be an unfair construction," said the Supreme Court, "to hold that the road was completed for one purpose and not the other." However, among other things, the Court permitted the railroads to deduct from earnings sums expended for additions. "The true interest of the government," said Justice Bradley, "will be subserved by encouraging a liberal application of the earnings to the improvement of the works." To avoid this possible construction, Congress had already altered the language of the statute, so that for the future the United States would receive a larger share of the earnings. Yet, another decision of the Supreme Court was required twelve years later before some of the payments could be collected on that basis."

Those who drafted the early legislation may have believed that half the amount due the railroads for services to the government, plus five per cent of the net earnings, would be sufficient to retire most of the railroad debt. As the companies were managed, however, the earnings were too low to permit the repayment of any substantial part of the government loans. Finally in 1878 Congress adopted the Thurman Act, which provided that twenty-five per cent of the net earnings was to be taken each year until the loans were repaid."

The railroad magnates denounced the legislation as robbery," but this time the Supreme Court, through Chief Justice Waite, spoke

<sup>18</sup> 18 Stat. 200, June 22, 1874.

<sup>19</sup> *Union Pacific R. R. Co. v. U. S.*, 99 U. S. 402, (1879); *U. S. v. Central Pacific R. R. Co.*, 99 U. S. 449 (1879); *U. S. v. Central Pacific R. R. Co.*, 138 U. S. 84 (1891).

<sup>20</sup> 20 Stat. 56, May 7, 1878.

<sup>21</sup> Daggett, *op. cit.*, 386-389.



in different language. The railroads were "created for public purposes" and "devoted to public uses." When Congress had created them, it had reserved the right to alter their charters. The stockholders were forced to trust the management "without much, if any, opportunity for personal supervision." The company had received large earnings and paid them out "without laying by anything to meet the enormous debt." The United States had not only a right but a duty to see that the corporation managers did not "appropriate to their own use that which in equity belongs to others."

A minority of three thought the statute unconstitutional. Entirely aside from the charter, said Justice Strong, the United States had made a contract which it could not now change; and this new statute was "a decree or sentence, the right to declare which, if it exists at all, is in the Judicial Department." Justice Bradley agreed. "The power of Congress," said he, "is not despotic." The statute was well calculated to excite alarm; it was repudiation and a blow at public credit; and it sapped the foundations of public morality. "The decision," agreed Justice Field, "will tend to create insecurity in the title to corporate property in the country." "

Attorney General Devens hailed the decision as most important. There were eight or ten other cases pending, and he hoped the chief grounds of dispute had been finally settled." But earnings were less than expected in the years which followed. The Thurman Act and the decision were not as helpful as had been anticipated.

The railroads were nevertheless worried. Changes in the Supreme Court were impending. Whitelaw Reid, editor of the *New York Tribune* and a prominent party leader, wrote James A. Garfield, soon to be elected President. Garfield replied, "On the suggestion of two or three friends I left out a paragraph from the letter of acceptance, touching that very subject and this was its purport; that, while in every just way we should promote cheap transportation yet the Government should not only sacredly respect vested rights, but should refrain from adopting any policy which would prevent capitalists from extending our great railroad system. I did not leave

<sup>77</sup> *Sinking Fund Cases*, 99 U. S. 700 (1879).

<sup>78</sup> *Ann. Rep. Atty. Gen.* 1879, 6.

this out because of any doubt as to the justice of the sentiment itself, but from motives of campaign discretion." <sup>81</sup>

Legal controversies with the Pacific railroads were to continue for decades. The statutes of 1862 and 1864 required them to provide telegraph service. This obligation, for the most part, they delegated to separate companies. The Western Union, growing rapidly under the direction of Jay Gould, absorbed these companies one after another.

In 1886 the Baltimore and Ohio Telegraph Company, said to be the sole remaining competitor of the Western Union, persuaded the House of Representatives to investigate the conduct of the land grant railroads with respect to telegraph business. "The evidence showed that wherever the Baltimore and Ohio line connected with a land-grant wire it cost from 30 to 50 cents more to send a dispatch, say, from Washington City to San Francisco, on the Baltimore and Ohio line, than it cost to send the same dispatch on the Western Union, notwithstanding the rates on the Baltimore and Ohio were cheaper than on the Western Union," said Representative Anderson of Mississippi. "And this was because the line of the Baltimore and Ohio extended no further westward than Omaha, and from that point the dispatch had to be carried on the wires of the Union Pacific, which were under the control of the Western Union." <sup>82</sup>

The Baltimore and Ohio Telegraph Company was merged with the Western Union before remedial action was taken by Congress. As a result of the investigation, a bill was introduced to compel the land grant railroads to maintain and operate telegraph lines and to provide non-discriminatory service. The Attorney General, by proper proceedings, was to prevent unlawful interference with the rights and equities of the United States. "The people of the United States are mightier than the most gigantic corporation," declaimed Representative Guenther of Wisconsin. "All the tremendous influence their unlimited wealth can procure, all the legal talent they can command, all the persuasive eloquence they employ, all the sophistry

<sup>81</sup> Sept. 2, 1880, Garfield Papers, Lib. Cong., by permission of H. A. Garfield; compare Warren, *op. cit.*, III, 344 *et seq.*

<sup>82</sup> Cong. Rec., 50 Cong. 1 Sess., 1294.

they so adroitly use, count for nothing when arrayed against the law of the land, against the people, the common people of this great Republic." <sup>83</sup>

The measure passed. The Western Union instituted a suit against the Union Pacific to prevent obedience to the statute. Through its counsel and through its president, Charles Francis Adams, the Union Pacific urged Attorney General Garland to join with the railroad, insisting that the interests of the railroad and of the government were the same. The Attorney General dallied with the idea for some time, and then wrote that while intervention would seem to him expedient he thought it best to leave the decision to his successor in office. When W. H. H. Miller became Attorney General in March 1889, he decided against such procedure, believing that the two companies who purported to be suing each other were really friendly and that the United States would be left to fight both. <sup>84</sup>

Some years earlier the Treasury Department had raised the question whether the government might not be able to recover from the Western Union money paid for telegraph services over the land grant railroads. Attorney General Garland was of the opinion that the government might proceed, <sup>85</sup> and suit had been brought in New York. Attorney General Miller instituted a second suit against the two companies to annul the contract between them and enforce the statute requiring the roads to operate telegraph lines and provide non-discriminatory service. Suits were started at the same time against four other land grant railroads, each jointly with the Western Union.

Counsel were keenly aware of the prejudices of judges on railroad issues. J. L. Caldwell of Lincoln, Nebraska, who had charge of one of the suits against the Union Pacific, was apprehensive lest Justice Brewer, a nephew of Justice Field, "join with the Justice Field side of our controversy." The suits against the Central Pacific and the Southern Pacific were set for argument in the circuit court

<sup>83</sup> *Id.*, 1297-1298; see *In re Pacific Railway Commission*, 32 Fed. 241 (1887), and Swisher, *Stephen J. Field* (1930), 240 *et seq.*

<sup>84</sup> 25 Stat. 382, Aug. 7, 1888; *Ingersoll* to Garland, Jan. 22, 1889, and Adams to Garland, Nov. 30, 1888, D. J. Mss.; Garland to *Ingersoll*, Feb. 11, 1889, Letter Bk. T, 548; Miller to Butler, June 28, 1889, Letter Bk. U, 223.

<sup>85</sup> 19 Op. 76 (Nov. 30, 1887).

before Justice Field. After the argument had begun, it developed that the justice was disqualified. The cases were then argued before Justice Harlan, who decided in favor of the government.<sup>38</sup>

Soon afterward Justice Brewer decided an important private case against the Union Pacific. "The U. P. people," wrote Caldwell, "were so ruffled over the Rock Island decision of Judge Brewer that they will not be so anxious about the case coming before him." <sup>39</sup> Much maneuvering followed to determine which cases should be argued first and which judges should hear them. Apparently the railroad and telegraph interests thought Justice Brewer would be favorable to them on certain technical questions and against them on others, while Justice Field's position might be exactly the reverse. They therefore attempted to have the two justices sit together in circuit court, hoping to gain from the one what was lost from the other.<sup>40</sup> The case was argued before Justice Brewer alone, however, and he decided for the government. The decision was reversed by the circuit court of appeals, but an appeal to the Supreme Court of the United States resulted in final victory for the government.<sup>41</sup> It was now assumed that the business relationships between the Union Pacific and the Western Union would be disentangled and that the railroad would in due time arrange to provide proper telegraph facilities.

Meanwhile, the suit was still pending to determine whether the government might recover compensation paid for telegraph services over the land grant railroads. The Supreme Court in 1895 determined that the government lawfully might have withheld money due for telegraph services as provided by statute; but since the money had been paid in and dispersed, without a record as to whether railroad or telegraph company lines had been used, no recovery was possible.<sup>42</sup>

<sup>38</sup> Caldwell to Miller, Dec. 5, 1889, D. J. Ms.; Ann. Repts. Atty. Gen. 1891, 18; 1892, 16.

<sup>39</sup> *Chicago, R. I. and P. Ry. Co. v. Union Pacific Ry. Co.*, 47 Fed. 15 (July 27, 1891); Caldwell to Miller, July 30, 1891, D. J. Ms.

<sup>40</sup> See Miller to Aldrich, May 13, 1891, Instr. Bk. No. 12, 276; Aldrich to Miller, May 16 and 18, 1891, D. J. Ms.

<sup>41</sup> *U. S. v. Western Union Tel. Co.*, 50 Fed. 28 (1892), 59 Fed. 813 (1894), and 160 U. S. 1 (1895).

<sup>42</sup> *U. S. v. Western Union Tel. Co.*, 160 U. S. 53 (1895); and see 20 Op. 581.

While these controversies had awaited determination, other events affected both the repayment of the railroad debt to the government and the plans to compel the land grant railroads to operate telegraph lines. Railroad earnings had been lower than expected, and consequently the provisions of the Thurman Act had not established an adequate sinking fund. Waste, extravagance, and fraud were widely believed to exist, and by an act of March 3, 1887, Congress had authorized the appointment of three commissioners to investigate. Railroad managers and financiers had been lax in keeping records and refused to answer questions or submit data. An application to the circuit court in California to compel Leland Stanford to answer was unsuccessful. Such an investigation, said Justice Field for the circuit court, was an unconstitutional invasion of judicial power, states' rights, and personal rights.<sup>41</sup>

After securing what information they could, the commissioners were unable to agree whether definitely punitive measures toward the railroads should be adopted, or merely a readjustment of the obligations to the government. Charles Francis Adams, president of the Union Pacific, urged President Cleveland to support those recommendations which favored readjustment. "Where the leading creditor of a corporation is continually shaking its credit, especially where that leading creditor is the government, the credit of such corporation must necessarily suffer," he declared. "As a matter of business, and of justice, I ask for early action on your part."<sup>42</sup> President Cleveland submitted the commissioner's report to Congress. His attitude was not more than lukewarm toward the railroads.<sup>43</sup> Congress did nothing of importance. The time when the obligations of the railroads would mature was fast approaching, with steadily dwindling prospects of repayment.

The Central Pacific and the Union Pacific were in entirely different hands, but in chartering the two roads Congress had expected that they would cooperate in providing one efficient line of transportation from the Missouri River to the Pacific Ocean. However, the

<sup>41</sup> *In re Pacific Railway Commission*, *supra*.

<sup>42</sup> Adams to Cleveland, Dec. 10, 1887, Cleveland Papers, Lib. Cong.

<sup>43</sup> *Report of the U. S. Pacific Railway Commission*, Sen. Ex. Doc. 51, 50 Cong.

Stanford-Huntington group, which controlled the Central Pacific, built or acquired the units of the Southern Pacific, a competing trans-continental system south of the Central Pacific-Union Pacific line. They found it to their advantage to turn business away from the northern line, of which they owned a part, for the benefit of the southern system over which they had complete control. "It is currently reported in California," declared William J. Coombs, a government director of the Union Pacific, "that compulsion is brought to bear upon shippers, who wish to ship by the Central route to the East, to compel them to ship by the Southern route, and that, in every respect, it is treated as a tender to the interests of the Southern Pacific system."<sup>44</sup> In addition, the Central Pacific was leased to the Southern Pacific, and the business and financial resources which the former might have accumulated were filtered away for the benefit of the latter.

Consequently, the impoverished Union Pacific was driven to heavy expenditures in making connections with areas north and south of its original line. New business came slowly. The panic and depression of 1893 brought disaster, and the company was thrown into receivership.

The three receivers appointed by the court included one government director. Rumor spread that two of the receivers and the special government attorney were friendly to the Gould financial interests, which were of course deeply involved in the western railroads. Attorney General Olney failed in an effort to work out an arrangement whereby one of the receivers would resign and be replaced by some one designated by the government. He then secured the appointment of two additional receivers, so that government interests were protected by at least a nominal majority of the group of five.<sup>45</sup>

<sup>44</sup> Coombs to the Government Directors of the Union Pacific Railroad, Oct. 11, 1893, Cleveland Papers, Lib. Cong.

<sup>45</sup> Olney to Hoadly, Oct. 30, 1893, Olney Papers, *ibid.*; Anderson to Cleveland, Nov. 2, 1893, Cleveland Papers, *ibid.*; Ann. Rep. Atty. Gen. 1893, 23. Richard Olney (1835-1917) was born at Oxford, Massachusetts, graduated from Harvard Law School, began practice in Boston, was elected to the state legislature, was appointed Attorney General in 1893 by President Cleveland, and served until 1895 when he was transferred to the position of Secretary of State. He held no public office thereafter but retained an active interest in politics and civic affairs. James, *Richard Olney and his Public Service* (1923), and Dict. Am. Biog., XIV, 32.

The Union Pacific remained in receivership from 1893 until 1897, when the first government bonds came due. Attempts were made time and again to secure legislation whereby the government would extend the period of its loan at a reduced rate of interest. Olney took the lead in negotiating a plan to reorganize the road,<sup>46</sup> but Congress, highly sensitive to the prevailing hostility to the railroads, took no action.

As the time approached for the maturity of part of the debt, plans were made for foreclosure. It was finally arranged that a reorganization committee of Union Pacific bond and stockholders would effect a sale of the railroad, guaranteeing a minimum bid sufficiently large to take care of all remaining obligations to the government. The sale was made, the debt was liquidated, and a new Union Pacific Railway Company, created under the laws of the State of Utah, took over the properties.<sup>47</sup>

While this was a satisfactory end to the many years of struggle to protect the government loan to the Union Pacific, its effect upon the plans to compel railroad operation of telegraph lines was disastrous. The Supreme Court in its decision of 1895 had directed the circuit court to extend the period for the disentangling of the business of the telegraph and railroad companies. Counsel for the companies first delayed the entry of the decree and then secured extensions of time again and again. The circuit court appointed a master to discover the comparative rights of the two companies. He proved to be devoted to the interests of the companies and opposed to the separation, and before his connection with the case was complete he was a vice president of the Union Pacific. After the Union Pacific properties were taken over by the new Union Pacific corporation, he took the position that the decree could not be enforced at all.<sup>48</sup>

The Postal Telegraph-Cable Company had eagerly awaited the beginning of telegraph business on the part of the Union Pacific, hoping to extend its own business by making connections with the

<sup>46</sup> See Olney Papers, Lib. Cong.

<sup>47</sup> Ann. Reps. Atty. Gen. 1897, 3-7; 1898, 15-19; Sen. Doc. 83, 54 Cong. 2 Sess.

<sup>48</sup> Evidence on these points is to be found in many letters in D. J. File 1203-1887; for summaries see the letter of Dist. Atty. Sawyer, Aug. 16, 1898, and the report of Spec. Asst. Hutchins, Mar. 20, 1899.

Union Pacific lines." The Department of Justice endeavored to carry out the decree in the controversy already assumed to be won, but found itself blocked at every point. The question whether the decree against the original Union Pacific corporation was similarly applicable to the new Utah corporation kept the case open. Much was made of the fact that to compel competition in the telegraph business, and particularly to compel railroads to compete in this field, would constitute gross economic waste.

During all this time the Western Union and the Union Pacific had continued to cooperate in the conduct of telegraph business in disregard of the statute and decision requiring each railroad to furnish telegraph service. The Western Union had also followed a similar course with a number of other land grant railroads against which suits had likewise been instituted in the lower federal courts.

New difficulties appeared. A statute of August 13, 1888, prescribed that no civil suit should be brought in any circuit or district court in any other district than that of which the defendant was an inhabitant. If, as in most of the railroad-telegraph cases, the action was against two or more corporations, each of which was formed under the laws of different states, the statute made suit virtually impossible. Attorney General Olney, in reporting on these cases, recommended in vain that the statute be modified to permit suits against corporations wherever they might be found."

Late in 1899 counsel for the Northern Pacific called the attention of the district attorney at St. Paul to the condition of one of the cases, saying he thought the government had no further interest in it. Telegraph service was well performed on the Northern Pacific line, and no real benefit could be obtained from a successful prosecution. Furthermore, the Northern Pacific, like the Union Pacific, had been sold, and it was now operated by a state corporation, to which, he assumed, the obligations of the old corporation did not apply. The district attorney referred the matter to Attorney General Griggs who, upon investigation, found that the Northern Pacific

"Chandler to Conrad, April 8, 1897, D. J. Ms.

"Ann. Rep. Atty. Gen. 1893, 16; *U. S. v. Southern Pacific R. Co.*, 49 Fed. 297 (1892); *Galveston, etc., Ry. Co. v. Gonzales*, 151 U. S. 496 (1894).



was violating the statute."<sup>51</sup> Suit was brought against the Northern Pacific and the Western Union in the circuit court in Minnesota. Both the circuit court and, on appeal, the circuit court of appeals decided against the government."<sup>52</sup> There the matter rested.

The suits against the Central Pacific and Southern Pacific remained quiescent until the latter part of 1901, when the district attorney at San Francisco suggested that they be dismissed. Instead of directing dismissal, Attorney General Griggs asked Joseph H. Call of Los Angeles to look into the situation. Call advised prosecution under the railroad statute and also under the antitrust laws. He was employed to handle the cases for the government but soon afterward was directed by Attorney General Knox to suspend action until further notice, while the famous Sherman Act case against the Northern Securities Company was pending."<sup>53</sup>

After Knox had been succeeded by Attorney General Moody, Call was directed to dismiss the case."<sup>54</sup> In 1910 the chairman of the Interstate Commerce Commission wrote a letter of protest to the Attorney General. The next year, at the suggestion of the commission, the Attorney General recommended the repeal of the statute."<sup>55</sup> Curiously enough, the statute was never repealed.

Meanwhile, the collection of the Central Pacific debt followed quite different lines. The railroad had been organized under California laws, which made stockholders liable for their proportion of the debts of corporations. When the debt to the federal government was incurred, most or all of the stock of the company was held by four men—Stanford, Huntington, Hopkins, and Crocker. During the following decades each of them amassed huge fortunes, while the Central Pacific, like the Union Pacific, seemed likely to be unable to take care of its indebtedness to the United States.

<sup>51</sup> Evans to Atty. Gen., Nov. 29, 1899, with enclosures, D. J. Ms.

<sup>52</sup> *U. S. v. Northern Pacific R. Co.*, 120 Fed. 546 (1903); *U. S. v. Northern Pacific R. Co.*, 134 Fed. 715 (1905).

<sup>53</sup> Woodworth to Atty. Gen., Dec. 23, 1901, and Wickersham to Clapp, Oct. 10, 1912, and other correspondence in D. J. File 343-02.

<sup>54</sup> Wickersham to Clapp, Oct. 10, 1912, and Wickersham to Taft, Oct. 9, 1912, D. J. File 343-02.

<sup>55</sup> Chrm., I. C. C., to Atty. Gen., June 2, 1910, *ibid.*; Denison to Atty. Gen., Aug. 15, 1912, D. J. File 162905; Ann. Rep. Atty. Gen. 1911, 88-89.

Early in the 1890's, after the deaths of Hopkins and Crocker, Daniel H. Solomon, an enterprising lawyer, began to bombard the President and the Department of Justice with suggestions that government funds might be recaptured from the stockholders by properly conducted litigation. The Department was indifferent. Solomon persisted.

The sympathies of the Attorneys General and of many judges and eminent lawyers seem to have been strongly on the side of Mrs. Stanford, the executrix of the estate of her husband, who had died in the meantime. Moreover, Stanford had endowed a university in honor of his deceased son. The impression prevailed that any attempt to collect part of the Central Pacific debt from the estate of the man whose wealth was in no small part derived from that corporation would rob an infant educational institution.

Attorney General Olney reluctantly instituted action. Senator Hoar of Massachusetts soon afterward introduced a resolution directing the Judiciary Committee to inquire whether it would be expedient to relinquish the claim. His argument was based on the ground that Stanford's public benefaction would be nullified by the success of the action, but he was met with the reply that it was not usual to surrender government property into private hands no matter how laudable the purposes to which it would be devoted.\*\*

The Attorney General expressed his gratitude to Senator Hoar. "Whatever money may be due the government, or might be collected by it at the end of a litigation, will probably be of more use to humanity at large, if applied to the charitable purposes for which Mr. Stanford designed it than if administered by the United States," he declared. "I was so strongly impressed with this aspect of the matter that, though my attention was called to the claim immediately after Mr. Stanford's death, I delayed taking any steps in regard to it until the last moment. I was greatly in hope that some action of Congress would relieve me from the necessity of moving in the matter." "

Congress refused to act, and the Attorney General had to go on

\*\* See Cong. Rec., 53 Cong. 2 Sess., 5896-5897, 5950-5951.

\*\* Olney to Hoar, June 8, 1894, Olney Papers, Lib. Cong.

with the case. Mrs. Stanford hurried to Washington to consult with Justice Field, with whom the Stanford family had long been intimate. She also visited President Cleveland and Attorney General Olney.<sup>88</sup> Although Justice Field did not sit in the case when it was argued in the circuit court in California, it was said that he consulted with the judge who heard it and that he was responsible for the selection of Joseph H. Choate to defend the Stanford interests before the Supreme Court. Judson Harmon succeeded Olney as Attorney General while the case was pending. David Starr Jordan, president of the university, wrote Harmon urging that the case be speeded.<sup>89</sup>

After losing the case in the two lower courts, government counsel McKisick voiced bitter indignation at the attempts to make it appear that the university was involved in the case. "If I were to argue the case in the Supreme Court, and Mr. Choate should allude to it," said McKisick, "I would reply that a great deal of maudlin sentiment has been manifested in its behalf, but the fact is that it is the most astounding, vulgar, sepulchral monument to Egoism to be found in history, endowed with the largest race horse breeding establishment in the world, and with the largest vineyard in the world where is manufactured every year enough wine and brandy to debauch every misguided youth who attends the races to see the Stanford horses run or trot."<sup>90</sup>

Choate was victorious. The Supreme Court held that it was the federal law, and not the California statute, that governed the case. Moreover, whatever the California law might be with respect to other debts of the Central Pacific, Congress intended liability for the government loan to be the same as liability for the loan to the Union Pacific which was chartered by Congress; it was clear that stockholders were not responsible for the repayment of the Union Pacific debt and therefore that Central Pacific stockholders were similarly free from liability.<sup>91</sup>

<sup>88</sup> See Swisher, *op. cit.*, 244-245.

<sup>89</sup> McKisick to Conrad, Mar. 20, 1896, and Jordan to Harmon, July 2, 1895, D. J. File 7622-1892.

<sup>90</sup> McKisick to Conrad, Dec. 10, 1895, *ibid.*

<sup>91</sup> *U. S. v. Stanford*, 161 U. S. 412 (1896).

The decision left the Central Pacific itself as the only source from which the government funds might be recovered. The company resisted with every argument, urging that the United States should surrender its demands altogether or that the debt should be refunded for a long term at a low rate of interest. It seemed for a time as if foreclosure would provide the only method of collection. The Huntington interests, however, which controlled both the Central Pacific and the Southern Pacific, apparently thought it best to avert a situation in which the Central Pacific might be acquired by the group now dominating the Union Pacific and so provide effective competition for their southern line. They agreed to issue bonds, guaranteed by the Southern Pacific, which the government could dispose of and clear its books of the debt.\*\*

So ended the money obligations of the Union Pacific and the Central Pacific to the United States. The debts of other roads, some of which were connected with the Union Pacific system, ran on for many years with interminable difficulties. Serious problems arose out of the huge grants of land. These grants usually comprised alternate sections on both sides of the railroads, with the privilege of taking lands at a distance in case those bordering on the roads had already been granted or were exempted because of the presence of minerals or for some other reason. The exact line to be followed when the franchises were granted was often a matter of doubt, and subsequent surveys were frequently imperfect, leaving room for an enormous amount of controversy over areas which proved particularly valuable. Disputes involving aspects of these situations arose along every land grant railroad.\*\*

While these controversies were at their height, Congress in 1887 adopted the Act to Regulate Commerce despite protests in and out of Congress that the measure was unconstitutional, that it set up a bureaucratic establishment, and that federal power was unnecessarily extended into the customary domain of the states. The statute applied to all interstate railroads and created the Interstate Com-

\*\* See Daggett, *op. cit.*, 395 *et seq.*

\*\* For example, the long controversy over lands claimed by the Southern Pacific in California, *U. S. v. Southern Pacific R. Co.*, 146 U. S. 570 (1892), and subsequent cases, D. J. File 1938-1886.

merce Commission, but two decades were to pass before it was given effective authority to regulate rates and practices. This was a marked development of "administrative law" as an important field of federal justice. The rulings of the Commission still had to be defended in the courts and thus provided a substantial body of public litigation each year.<sup>64</sup> In addition, the several federal railroad statutes gave rise to many criminal cases, involving rebates, concessions, discriminations, false billing, or false claims; to civil cases to recover penalties and to compel compliance or enjoin violations of the Interstate Commerce Act; as well as to other cases under the Safety Appliance Act, Hours of Service Act, and Locomotive Boiler Inspection Act.<sup>65</sup>

The Pacific railroads had opened the continent, and the Iron Horse brought with it new problems and new methods of government.

<sup>64</sup> See, generally, Sharfman, *The Interstate Commerce Commission* (5 vols., 1931, 1935, 1936, 1937); McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission* (1933), Chs. I, IV; Ann. Reps. Atty. Gen. 1905, 14; 1931, 32.

<sup>65</sup> See *id.*, 1909, 6; 1910, 6; 1911, 14; 1912, 23; 1913, 17; 1914, 22; 1923, 98; 1930, 28, 73. *Commerce Court: Id.*, 1912, 56. *Commodities Clause: Id.*, 1915, 7; 1914, 5; 1916, 7; 1917, 7; 1930, 28. *Safety Appliance: Id.*, 1905, 20. *Rate discriminations: Id.*, 1906, 10; 1910, 10; 1912, 27.

## CHAPTER XV

### WHAT HATH GOD WROUGHT

ON May 24, 1844, the first telegram was flashed from Washington to Baltimore, "What hath God wrought!" Samuel F. B. Morse ticked off this message from the chamber of the Supreme Court of the United States. Thirty-two years later, in 1876, Alexander Graham Bell, speaking for the first time over telephone wires stretched in his workshop, said to his assistant, "Mr. Watson, please come here, I want you."<sup>1</sup>

As the Pacific railroad troubles were entering their last phase, a new and prolonged struggle was developing, not out of the grant of corporate rights or government loans or grants of land but out of the awards of basic patents in the new field of telephone communication. For a decade or two many experiments had been made in an effort to perfect an instrument which would convey over long distances the sound of the human voice, but commercial use began only after the award of patents to Alexander Graham Bell on March 7, 1876, and January 30, 1877. The invention was hailed with enthusiasm. The production and leasing of telephones quickly became a profitable business for two new corporations. These were merged into the National Bell Telephone Company, which upon reorganization became the American Bell Telephone Company.<sup>2</sup>

Other inventions in this field were completed about the same time, and a number of improvements were made. These were acquired by the Western Union Telegraph Company which immediately entered into competition and seemed likely to assume a dominant position. The Bell interests acquired a patent for a transmitter which again placed them in the lead.

<sup>1</sup> Morse, *Letters and Journals* (1914), II, 219-220, 221-222; MacMeal, *Independent Telephony* (1934), 14-15.

<sup>2</sup> For summaries of the early history of the telephone, see Stehman, *The Financial History of the American Telephone and Telegraph Company* (1925), and Casson, *The History of the Telephone* (1910).

Patent litigation between the companies was settled out of court. The Western Union agreed to retire from the telephone business with the admission that the original Bell patents were valid. The Bell company agreed to buy the telephone equipment theretofore used by the Western Union or its telephone subsidiary and to pay to the Western Union for seventeen years a royalty of twenty per cent on all telephone rentals. It further agreed not to permit the use of the telephone for the transmission of news, market quotations, or other items which made up normal telegraph business. Although the agreement required heavy tribute, the Bell company was freed from competition and left unrestrained to pursue its rapid course to a leading position among the corporations of the country. Telephone service was eagerly welcomed, the business spread rapidly, the profits were enormous, and the price of the stock increased accordingly.

The public soon became convinced, however, that the charges were exorbitant. Large profits were cited as persuasive evidence. A number of states began to discuss the regulation of rates, and questions were raised as to the validity of the patents on which the telephone monopoly was based. New companies were organized to exploit other inventions claimed to have been made prior to that of Bell or containing improvements or modifications. The Bell company instituted a number of infringement suits; but none of the new companies was comparable in resources to the Bell organization, and none was equipped to bring together all the complex evidence. Furthermore, it was suspected in certain instances that the company being sued was secretly dominated by the Bell interests, and that a favorable judicial decision was being sought in what was virtually a collusive case.\* The inability of the smaller organizations to cope with the larger one and the doubts as to the nature of some of the suits led to discussions of the possibility that the Department of Justice might institute proceedings for the annulment of the Bell patents.

The Pan-Electric Telephone Company was formed in 1883 to utilize the inventions of J. Harris Rogers of Washington, D. C. To

\* See *American Bell Telephone Company v. People's Telephone Company*, 22 Fed. 309 (1884); *American Bell Telephone Company v. National Improved Telephone Company*, 27 Fed. 663 (1886); *American Bell Telephone Company v. Molecular Telephone Company*, 32 Fed. 214 (1885); and other cases; Lowrey to Goode, Mar. 9, 1886, D. J. File 6921-1886.

secure influential names to aid in launching the corporation, a few prominent members of the Senate and House of Representatives were each given a tenth of the company's stock.<sup>4</sup> As if expecting to co-operate with the Bell company, the Pan-Electric group unsuccessfully negotiated for the use of the Bell company's transmitter and receiver. Vain attempts were then made to dispose of the Pan-Electric rights for some millions of dollars. From contracts for the use of its inventions, the company derived enough revenue to pay substantial dividends.<sup>5</sup> But it was apparent that infringement suits by the Bell interests were imminent. Senator Augustus H. Garland of Arkansas held one tenth of the Pan-Electric stock and had been appointed attorney for the company.<sup>6</sup>

The strategic position of Pan-Electric seemed to improve with the change of administration in 1885. Its shareholders were largely Democrats, and a number of them found their way into important positions in the government. Senator Garland became Attorney General in the Cleveland cabinet. Joseph E. Johnston and J. D. C. Atkins became, respectively, Railroad Commissioner and Commissioner of Indian Affairs in the Department of the Interior which had jurisdiction over the Patent Office. The Assistant Commissioner of Patents, while a member of Congress, had introduced a bill authorizing the Attorney General to bring proceedings to vacate patents.

As soon as Garland entered the cabinet, his colleagues urged him to bring suit to vacate the Bell patents, but he hung back. He received similar petitions from Watson Van Benthuyssen, president of the National Improved Telephone Company, who charged that Bell was not the inventor of the telephone and that his device had been anticipated by others.<sup>7</sup> Garland forwarded the letter to the Secretary of the Interior, with a request for his opinion.<sup>8</sup>

Months rolled by, during which the controversy grew more heated. According to unsympathetic newspapers, Garland arranged to take a vacation which would leave Solicitor General John Goode

<sup>4</sup> Testimony, *Charges against Certain Public Officers Relating to the Pan-Electric Telephone Company*, House Misc. Doc. 355, 49 Cong. 1 Sess., 122, 137.

<sup>5</sup> *Id.*, 17-18, 122, 293-294, 390.

<sup>6</sup> *Id.*, 651-652.

<sup>7</sup> Van Benthuyssen to Garland, July 12, 1885, D. J. File 6921-1885.

<sup>8</sup> Garland to Van Benthuyssen, July 14, 1885, Letter Bk. R, 46; Garland to Sec. Int., July 14, 1885, Ex. and Cong. Letter Bk. P, 297.



of Virginia in charge of the Department of Justice. Van Benthuyssen and other stockholders went to District Attorney H. W. McCorry of Jackson, Tennessee, to urge him to institute a suit to annul the Bell patents. McCorry amassed material to show that Bell was not the inventor of the telephone and that there were irregularities in securing the patent. He wrote the Attorney General advising that a suit be brought in the name of the United States. The letter and accompanying evidence were received by the Solicitor General, who promptly authorized McCorry to begin action. Associate counsel were to be employed at the expense of private parties.\*

The New York *World* was critical. It pointed out that although Goode was Acting Attorney General and had all the work of the Department of Justice to direct, "he had time to consider a question involving millions, examine the papers in the case, determine upon the propriety of the suit, see that authority existed to bring it and order the commencement of it; all within one working day of seven hours." Such prompt action, the *World* said, "has hardly ever been paralleled in a Government office."<sup>10</sup> Vacationing in the South, Garland had no official information of these events until more than three weeks later when he read an article in a New Orleans paper. He immediately issued a statement that permission to bring suit had not been granted by him.<sup>11</sup> Hostile newspapers uncovered the connection of the Attorney General with the Pan-Electric, and in spite of his disclaimer the matter threatened to create a serious scandal.

When Garland returned to Washington, President Cleveland asked for an explanation. In the presence of the cabinet, Garland made a statement of his connection with the Pan-Electric and offered to resign if any of his colleagues thought that he had embarrassed the administration. He was not asked to resign, but the President requested a written statement.<sup>12</sup> Cleveland reprimanded Solicitor General Goode, stating that accepted procedure required that patent

\* McCorry to Garland, Aug. 31, 1885, D. J. File 6921-1885; Goode to McCorry, Sept. 3, 1885, Instr. Bk. S, 375.

<sup>10</sup> New York *World* article, quoted in Pan-Electric testimony, *op. cit.*, 783.

<sup>11</sup> New Orleans *Times-Democrat*, Sept. 28, 1885.

<sup>12</sup> New York *Times*, Feb. 9, 1886; Garland to Pres., Oct. 8, 1885, Ex. and Cong. Letter Bk. P, 464.

matters be referred first to the Interior Department and suggesting that the suit ought to be dismissed. Goode defended his action but nevertheless directed that the suit be withdrawn.<sup>14</sup>

The opponents of the Bell interests promptly renewed their request for a suit to annul the patent, which McCorry forwarded to Goode who in turn sent the materials to L. Q. C. Lamar, Secretary of the Interior. Lamar in person conducted extensive hearings. He came to the conclusion that, although no statute specifically authorized the government to sue for the annulment of a patent, such a power nevertheless existed and that the evidence against Bell was sufficient to justify action. The Department of Justice arranged to proceed. Solicitor General Goode acted as Attorney General in the government telephone case, since Attorney General Garland was disqualified because of his interest in Pan-Electric.<sup>15</sup>

The controversy caused a furor of discussion in the House of Representatives. A resolution called for a tabulation of expenditures, but the outlay had been negligible. A second resolution called for the appointment of a special committee to secure details. Representative Joseph Pulitzer, editor of the *New York World*, embroiled in newspaper warfare on the subject, secured the adoption of an amendment calling for investigation of newspaper influence in the case. Much testimony was taken, revealing the mushroom character of the Pan-Electric organization and the connection of Garland and others with it. The results were inconclusive.<sup>16</sup>

Five lawyers were chosen to conduct the government's case against the Bell company. One was Allen G. Thurman of Ohio, author of the Thurman Act having to do with the Pacific railroads. He was regarded as anti-corporation in attitude. Another was Grosvenor P. Lowrey, a former attorney for the Western Union who had made a special study of telephone patent litigation.

For some time no decision was made as to the circuit in which the suit would be brought. The city of Washington was obviously the place of greatest convenience for the government, but difficulty in

<sup>14</sup> See the *Nation*, Feb. 4, 1886; Goode to Pres., Oct. 9, 1885, Cleveland Papers, Lib. Cong.

<sup>15</sup> See Goode to Bowditch, Oct. 19, 1885, Letter Bk. R. 178; Lamar to Goode, Jan. 14, 1886, D. J. File 6921-1885; the *Nation*, Feb. 11, 1886.

<sup>16</sup> Cong. Rec., 49 Cong. 1 Sess., 1411, and see the testimony cited above.

securing competent jurors was foreseen. The Bell company preferred Boston. It had been formed under the laws of Massachusetts, and jurisdictional questions would be less serious there than elsewhere. However, the fact that the federal judges in Massachusetts had already decided in favor of the Bell company in private patent suits created fear that their attitude would be far from impartial. Should Washington not be chosen, Lowrey favored the New Jersey circuit, to be near the scientific school at Princeton. The Pan-Electric interests still preferred Memphis.<sup>16</sup>

H. P. McIntosh, representative of an independent telephone company, recommended an Ohio circuit. "Judge Baxter is an able, painstaking, laborious and honest judge and one that has inspired confidence as to all those qualities throughout his Circuit," he wrote. "Thus far I believe that he has not had occasion to investigate any telephone case and hence would start in free from all bias." Ohio was finally chosen, but government critics insisted that freedom from bias was not one of Judge Baxter's prominent characteristics. He was said to have strong sentiments against letters patent. It needed a very clear case of infringement to succeed with him, they said, and he was frequently referred to as a "patent smasher."<sup>17</sup>

Arrangements had no more than been agreed upon when Baxter died. President Cleveland appointed Howell E. Jackson, formerly a Senate colleague of Attorney General Garland, to succeed Baxter. The Bell company challenged the jurisdiction of the court on the ground that service of process could not be had upon the company in Ohio and also asked government counsel to request Chief Justice Waite to sit with Judge Jackson in the circuit court.<sup>18</sup> Solicitor General Goode refused to make any such concession. He scoffed at the idea that the pending issue had had anything to do with the appointment of Judge Jackson or that he could not be trusted to decide the case alone. Thurman had previously suggested that if the Bell company would submit to the jurisdiction of the court, Chief Justice Waite might be called in to hear and pass upon the merits of the

<sup>16</sup> *New York Times*, Feb. 4, 5, 8, 1886; the *Nation*, Oct. 8, 1885; see *American Bell Telephone Co. v. Dolbear*, 15 Fed. 448 (1883); 17 Fed. 604 (1883); Lowrey to Goode, Feb. 9, 1886, D. J. File 6921-1885.

<sup>17</sup> McIntosh to Goode, Feb. 11, 1886, *ibid.*; *New York Tribune*, Nov. 12, 1886.

<sup>18</sup> Lowrey to Goode, May 29, 1886, D. J. File 6921-1885.

case; but since the company refused, he too saw no reason for granting the company's request.<sup>19</sup>

The nomination of Goode as Solicitor General, which had long been pending in the Senate, failed for reasons unconnected with the Bell case. Goode was thereupon retained as special counsel. George A. Jenks, an Assistant Secretary in the Department of the Interior who had participated in Secretary Lamar's investigation and had written an opinion advising suit, became Solicitor General.

The jurisdictional question was argued before Judge Jackson and District Judges Welker and Sage in September 1886. The government went down to defeat. Although the Bell company leased telephone equipment in Ohio, the court held that it was not subject to service of process there.<sup>20</sup> "How keen must be the humiliation of the telephone speculators within and outside government departments in learning that their case has been dismissed," derisively remarked the hostile *New York Tribune*. "The Administration, having condoned Mr. Garland's prostitution of public funds to private ends, has not succeeded in dishonoring or compromising the reputation of the federal courts."<sup>21</sup>

The decision left government counsel in a quandary. They were in doubt as to the proper mode of appealing to the Supreme Court, and even further in doubt whether an appeal of any sort at the moment would be wise. A number of private suits were pending in the Supreme Court between the Bell company and independent companies. "A little masterly inactivity" might be profitable, thought Lowrey who was appearing before the Supreme Court in one of these cases.<sup>22</sup> As opposed to taking an appeal, the government had the alternative of instituting a new suit in Massachusetts, where there were no jurisdictional difficulties. If the possible prejudices of the community and of the judges were to be disregarded, such a procedure would advance the case more rapidly than going to the Supreme Court where at best nothing more would be decided than that the federal court in Ohio should hear the case.

<sup>19</sup> Goode to Lowrey, June 2, 1886, Instr. Bk. U, 249; Thurman to Goode, May 24, 1886, D. J. File 6921-1885.

<sup>20</sup> *U. S. v. American Bell Telephone Company*, 29 Fed. 17 (1886).

<sup>21</sup> *The New York Tribune*, Nov. 12, 1886.

<sup>22</sup> Lowrey to Jenks, Nov. 30, 1886 D. J. File 6921-1885.

Government counsel held a conference in Columbus early in December 1886. It was decided to drop the Ohio suit altogether and institute another in Massachusetts. The necessary steps were taken, and preliminary legal skirmishes took place during the ensuing months. The first real difficulty placed in the way of government counsel by the Bell company was the contention that the Attorney General had no authority to institute a suit to annul a patent. This was argued in June 1887. Lowrey felt that the government's case was adequately presented and that he had scored a point in fencing with Storrow, who represented the defendant. He was able to quote an earlier opinion by Storrow to the effect that the Attorney General had the power to bring a suit of this kind.

"I should not have used this," Lowrey wrote Jenks, "thinking the *argumentum ad hominem* of but little dignity or value as a general thing . . . had not Storrow laid great stress upon what he called 'the opinion of the Bar' and read several letters by prominent men. I was able therefore, to enter a competitor, and to champion him, which I did without stating who it was until after I had paid him a good many compliments as being much more likely to be right than the others, and had also read in full the language with the clearness and force of which the court seemed to be struck. I ended by saying 'and his name was Storrow.' " "

Judge Colt, who had heard the arguments, some weeks later was reported as saying that the government had no right to bring the suit. On September 26, 1887, he handed down a decision. The precedents were conflicting, he declared, but on the whole it was his opinion that the government had no such authority in the absence of a statute specifically conferring it.<sup>22</sup>

The private patent infringement cases had meanwhile been argued before the Supreme Court. Lowrey appeared for the Molecular Telephone Company. He considered his presence of such importance to the United States that he attempted to collect from the government a fee for his time in court, amounting to one hundred

<sup>22</sup> Lowrey to Jenks, June 21, 1887, *ibid.*

<sup>24</sup> Strawbridge to Jenks, Aug. 15, 1887, *ibid.*; *U. S. v. American Bell Telephone Co.*, 32 Fed. 591 (1887).

dollars a day for thirteen days, which the Solicitor General refused to approve."

Before the government's appeal in the Massachusetts case could be argued, the Supreme Court in the private cases decided that on the basis of the evidence presented the Bell patents were valid." Government counsel were therefore faced with the necessity of securing not only a reversal of the decision of the lower court on the point of the Attorney General's right to sue, but also of presenting sufficient additional evidence to persuade the Supreme Court in a new case that the Bell patents were fraudulent or unlawful.

There was continued criticism in some newspapers, and Garland never acquired the reputation as Attorney General which might have been his had the controversy not arisen. The fees of special government counsel were a basis for criticism of the administration. In the House debate on the appropriation bill in the summer of 1888 it was stated that special counsel had already received more than forty thousand dollars. The bills of Lowrey particularly were subjected to caustic comment. "He charged \$100 while sleeping *en route* to Cincinnati," said Representative Sowden of Pennsylvania." This became a catchword of criticism in an attempt to cut off all expenditures for special counsel. Lowrey ascribed the debate in Congress to ulterior motives. "To work hard, and not to be paid," he wrote the Attorney General, "and to be subjected to the special odium of a congressional debate, and an Act of Congress forbidding your services to be compensated, is rather more than any patriot is bound to submit to." "

The government continued to press its case against the Bell company, even after the Harrison administration came to power. The jurisdictional question involved in the appeal from the federal court in Massachusetts was argued in October 1888 and decided in favor of the government. The Supreme Court held that the Attorney General had power to sue to cancel a patent obtained by fraud, accident, or mistake, even though no statute dealt specifically with the subject.

"Jenks to Lowrey, Feb. 19, 1887, Instr. Bk. W, 122.

"*Telephone Cases*, 126 U. S. 1 (1888).

"*Cong. Rec.*, 50 Cong. 1 Sess., 5486.

"Lowrey to Miller, June 3, 1889, D. J. File 6921-1885.

Grave injury to the public might result from the illegal granting of patent rights where millions of dollars and a great public utility were involved."

The case went back to the circuit court in Boston to be tried on the merits. After more delay, the government was at last about to begin taking testimony, but unfortunately, although there had been much discussion since the Ohio case was instituted in 1886, counsel had never fully agreed as to what they wished to prove or how they were to prove it. They relied heavily upon the contention that Philip Reis of Germany had anticipated the Bell invention and that Bell's knowledge of the Reis invention made his own application for a patent fraudulent. The government and the Bell company planned to share the expenses of taking testimony in Europe, but counsel failed to agree upon a procedure fair to both parties. A government representative did some scouting, but no testimony was taken.

When some contentions in the government case were in part discredited by a decision in a private suit in New Orleans, government counsel suggested that the prestige of their case might be restored in the eyes of the public by bringing a number of eminent scientists to the United States to testify.<sup>90</sup> This also failed to materialize. Meanwhile, the decision of the Supreme Court in the private infringement cases had completely disrupted the plans of government counsel, for the Court held that the Reis invention was not such as to anticipate that of Bell.

By the time the government was ready to take testimony it seemed doubtful that sufficient new evidence could be found. On the other hand, the decision of the Supreme Court showed that three of the seven judges believed the Bell patent had been anticipated by one produced by Daniel Drawbaugh. Five days after the decision was handed down, Chief Justice Waite died, leaving the division on that issue three to three. Justice Gray had not participated in the decision, perhaps because he sat in one of the telephone patent cases in the court below or because of criticism based on the ownership of Bell

<sup>89</sup> *U. S. v American Bell Telephone Co.*, 128 U. S. 315 (1888).

<sup>90</sup> Lowrey to Goode, June 14, 1886, D. J. File 6921-1885; *American Bell Telephone Co. v National Improved Telephone Co.*, 27 Fed. 663 (1886); Lowrey to Goode, June 14, 1886, D. J. File 6921-1885.

stock by members of his family."<sup>11</sup> In view of his position in the lower court, he could be expected to uphold the Bell patents if he sat in a later case. The new justice, who had been appointed too recently to participate in the decision, might be expected to favor the government's position, for he was L. Q. C. Lamar who as Secretary of the Interior had advised suit against the Bell patents. This still left the Court evenly divided and hence the new Chief Justice, Melville W. Fuller, might conceivably turn the decision by agreeing that the telephone had been invented by Drawbaugh.

Government counsel debated at length whether they should completely change their method of approach by abandoning their contention that Reis had anticipated Bell."<sup>12</sup> Lowrey particularly advised the change. No important new evidence was available, he declared, and without new evidence the Supreme Court could not be expected to alter its position. Attorney General Miller finally directed that evidence of the Reis invention be dropped."<sup>13</sup>

The case was left almost entirely in the hands of Charles S. Whitman. One after another the other government counsel resigned. For more than two years Whitman labored to accumulate evidence. Six months were consumed by defendants in cross-examining one witness, three months in vacations ordered by the Court, and much time in procedural maneuvers. When Whitman had concluded, the Bell company in leisurely fashion continued the taking of testimony until the latter part of 1895. Whitman estimated that six months would be needed for the accumulation of rebuttal evidence. The record filled more than twelve thousand typewritten pages."<sup>14</sup> By this time, the two Bell patents had expired. It had been predicted long before that the company would delay the case until this had happened."<sup>15</sup>

In 1892, shortly after the basic Bell patents had expired and while testimony was being taken in the long pending suit, the Department of Justice began to consider a proceeding to annul another patent

<sup>11</sup> See Perkins to Garland, July 1, 3, and 6, 1886, D. J. File 6921-1885.

<sup>12</sup> See, on still another applicant for a patent, Elisha Gray, Whitman to Goode, Dec. 31, 1886, *ibid.*; *The Nation*, May 27, 1886.

<sup>13</sup> Lowrey to Miller, Jan. 26, 1890, and Lowrey memorandum, Feb. 24, 1890, D. J. File 6921-1885; Miller to Lowrey, Mar. 31, 1890, Letter Bk. V, 111.

<sup>14</sup> Whitman to Olney, Sept. 26, 1893, D. J. File 6921-1885; Whitman to Harmon, Nov. 14, 1895, *ibid.*

<sup>15</sup> See Whitman to Jenks, Sept. 13, 1889, D. J. File 6921-1885.



owned by the Bell company and known as the Berliner patent. It had been granted in 1891 and had until 1908 to run. It was of so broad a nature that many feared it would create a burdensome monopoly. Solicitor General Charles H. Aldrich had previously been counsel for Milo G. Kellogg, a minority stockholder in the Great Southern Telephone and Telegraph Company. A majority of the stock was owned by the Bell interests, and it was claimed that the Bell company so managed the finances of the smaller company as to drain off dividends which might otherwise have been paid to stockholders. Aldrich had engaged in unsuccessful attempts to protect Kellogg's interests.

Kellogg prepared and sent to Solicitor General Aldrich a brief to prove that the Berliner patent should be annulled. Aldrich turned the brief over to Attorney General Miller, volunteering additional reasons why action should be taken. It was said that this invention had long been used—since 1879—and therefore a patent should not have been granted at all. Furthermore, although the original application for the patent had been made in 1877, proceedings had been allowed to dally along in the Patent Office until 1891. Some believed that the Bell company had permitted, if not encouraged, the delay in the knowledge that the later the date of the patent the longer it would run.

"That a patent should be pending in the office from 1877 to 1891 before receiving final action, is, in itself, it is submitted, discreditable," Aldrich declared, "but when it is found that this patent is owned by a monopoly perhaps the most exacting in the commercial world, which upon a mere grant for an invention has succeeded in paying large dividends upon nearly if not quite \$150,000,000 and these facts are coupled with the further consideration that the original patents from which these large revenues are derived, expire in 1894, and that by delaying the Berliner patent until this time the monopoly is effectually continued, a conclusive reason for a delay is apparent." \*\*

The papers dealing with the case were sent to the Secretary of the Interior, who referred them to the Commissioner of Patents.

\*\* Aldrich to Miller, Nov. 22, 1892, D. J. File 11,437-1892.

Commissioner Simonds wrote the Secretary that the Solicitor General was involved in the case as counsel for a private litigant, told of his connection with Kellogg, and gave information which, according to Aldrich, could have come to the Commissioner of Patents only from the officers of the Bell company. Aldrich asked for a copy of Simonds' letter but Secretary of the Interior Nobel declined to give it. "I think that because of the letter, your feelings toward him have become unfriendly, and I think it would not be just for me to send the copy asked," he wrote to the Attorney General. "The letter was written to me and the contents communicated to you in official confidence and I prefer to have my connection with the matter cease at this point." \*\*

Aldrich then wrote the Attorney General in his own defense, giving an account of his relations with Kellogg and declaring that he had participated in no litigation involving the Bell patents. He charged that Simonds must have been in contact with the Bell company in order to secure the information his letter was said to have contained, and he urged that the Department should have the cooperation of a commissioner whose affiliations with the defendant were less intimate. \*\*

The Bell company asked for a copy of the original Aldrich letter advising that suit be instituted. Attorney General Miller took the position that it was not customary to give out copies of such correspondence, but Aldrich advised him to comply, saying the case could not be hurt by the letter and any other course would create the impression that the government had something to conceal. Characterizing the request as "most unusual," Miller sent the letter. He said his attention had first been called to the "remarkable history and character" of the patent by the Solicitor General, who had submitted a brief showing why he believed it invalid. No action had been taken, however, until after thorough and independent investigation. \*\*

The Secretary of the Interior, who had been lukewarm from the beginning, refused to accept responsibility for the suit. He declared

\*\* Nobel to Miller, Jan. 31, 1893 *ibid*

\*\* Aldrich to Miller, Jan. 31, 1893 *ibid*

\*\* Aldrich to Miller, Feb. 17, 1893, *ibid*, Miller to Swan, Feb. 17, 1893, Misc. Letter Bk. No. 10, 173

he had no right to review the findings of the patent office and that the question should be left to the Department of Justice. If the patent was deemed invalid, he thought the government should proceed. The Attorney General referred the matter to Robert S. Taylor, a patent lawyer, and received from him an opinion that the Berliner patent was invalid on a number of grounds.<sup>40</sup>

Suit was begun in Boston under Attorney General Miller's direction toward the end of the Harrison administration, which, on March 4, 1893, was succeeded by President Cleveland's second administration. Attorney General Olney therefore found himself heir to the controversy. Taylor, who had been appointed special counsel, supplied the new Attorney General with a long memorandum summarizing the history of the case and the points on which it was based. Aldrich, now out of office as Solicitor General, was also offered the position of special counsel. He declined at first, then agreed to accept, and withdrew again when it appeared that for political reasons his appointment would be objectionable to the administration.<sup>41</sup> A number of other lawyers were retained to handle the litigation with Taylor.

The sentiment of the day was hostile to great corporations. The Populist movement was at its height. Coxey's army was on the march. Labor troubles developed, and on every hand there were evidences of unrest. Citizens' and taxpayers' organizations, anti-monopoly leagues, and labor groups addressed petitions to the Department of Justice and to Congress praying relief from the burdens of corporation control. "*Be it Resolved*," declared the Hatters National Union, "that we petition the President of the United States, the Attorney General, and the Senate and House of Representatives to relieve the People from the oppressions and exactions of this great and powerful monopoly, who propose, in defiance of all Laws and Justice, the voice of the Press, and the desires and will of the People, to continue to rule and rob our citizens who use the telephone, by a fraudulent use of this illegal reissued Patent, and by dilatory litigation in our Courts of Justice." The Trades League of Philadelphia,

<sup>40</sup> See Kellogg to Aldrich, received Jan. 18, 1893, D. J. File 11,437-1892, Taylor to Miller, received Jan. 26, 1893, *ibid*.

<sup>41</sup> Aldrich to Harmon, Oct. 8, 1896, *ibid*.

an organization of leading business firms, wrote the Attorney General that he "would be warmly commended from one end of the United States to the other by the business men who have to use this at present high priced business accessory—the telephone." <sup>43</sup>

Bills were introduced in Congress to investigate and report on the history of the application for the Berliner patent. As the result of protests from his special counsel, the Attorney General wrote the chairman of the Senate Committee on Patents that his investigation was nearly completed in the suit then pending. "It is clear to my mind that the proposed investigation by the Commissioner of Patents," said Olney, "will not assist the Government's suit while in its practical effect it may operate to obstruct and delay it." <sup>44</sup>

The circuit court on December 18, 1894, held the Berliner patent invalid on two grounds. First, it was a reissue of a former patent. Second, the failure to use diligence in prosecuting the application constituted an unlawful delay. The Bell company took the case to the circuit court of appeals, where government counsel relied on the same two points. "And of these, the question of delay in the Office is the one which I regard as the important one," wrote Taylor to Olney. "If the contention of the Government upon that issue shall be sustained finally the case will be a landmark in the history of the law." In his closing argument associate government counsel declaimed, "Judge Carpenter nailed his standard to the mast-head, will the Court of Appeals haul it down?" <sup>45</sup>

The court of appeals hauled it down. Judge Putnam wrote that the Bell company had fulfilled all its obligations under the law. It was in no sense responsible for any delays in the Patent Office. It was not incumbent upon the company to take any action to speed the Patent Office in its handling of the application. Government counsel had not directly accused the company of fraud, he said, but had merely argued that acquiescence in delay was fraudulent. There was no place in the law for the contention of government counsel that

<sup>43</sup> Hatters' petition received Mar. 23, 1893, *ibid*, Martindale and others to Olney, Mar. 27, 1893, *ibid*.

<sup>44</sup> Olney to Gray, Mar. 17, 1894, Ex. and Cong. Letter Bk. No. 16, 480.

<sup>45</sup> *U. S. v. American Bell Telephone Co.*, 65 Fed. 86 (1894), Taylor to Olney, May 1, 1895, D. J. File 11,437-1892.

the company owed to society an obligation to secure as quickly as possible a patent for which it had made application, thereby hastening the day when it would be open to the unrestricted use and enjoyment of the public. The court held that the Berliner patent was not void as a reissue of a patent previously granted. It did not pass upon the question of the identity of the two patents, but decided that the decision of the Patent Office should not be disturbed.<sup>43</sup>

The case was appealed to the Supreme Court. Taylor wrote Aldrich to ask if he were sufficiently interested in the case to file a brief. Aldrich, who was now in private practice, was again serving the interests of Milo G. Kellogg. It was agreed that he should appear as special counsel for the government at a nominal fee.<sup>44</sup> Before the Supreme Court, Taylor argued three points—the delay in granting the patent, the acquiescence of the Bell company, and the circumstances suggesting fraud. "We need not look for any precedent of such a question as that," he declared. "Fraud is never-ending in the variety of its forms."

The appeal was decided against the government in 1897. "Counsel seem to argue," Justice Brewer declared for the Supreme Court, "that one who has made an invention and thereupon applies for a patent therefor, occupies, as it were, the position of a quasi trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible." With this view Justice Brewer entirely disagreed. It was unnecessary, he asserted, to determine whether the Berliner patent of 1891 covered an instrument which had been in use since 1878, under the protection of other patents, and so extended patent rights until 1908—a period of thirty years, instead of the regulation period of seventeen years. This question, he believed, was better left to suits between private parties. In fact, he felt that the whole proceeding was in aid of some private party rather than an effort to protect the public from a wrongfully granted monopoly. Berliner had made his invention available to public use, induced to do so by the grant of a monopoly. "The Gov-

<sup>43</sup> *American Bell Telephone Co. v. U. S.*, 68 Fed. 542 (1895).

<sup>44</sup> Aldrich to Harmon, Oct. 8 and 10, 1896, D. J. File 11,437-1892.

ernment parted with nothing by the patent," he wrote. "It lost no property." "

Meanwhile, the original suit against the two earlier patents, now expired, was still pending. Whitman advised against dropping it. "The United States has practically encouraged the infringement of the patents," said he, "and parties who have infringed these patents, will, it seems to me, have a good ground to complain of their government, as long as they remain liable to be sued for infringement, in case a final decree is not rendered in this cause through any neglect on the part of the United States." "

The Attorney General made periodic mention of the case in his annual reports to Congress. He called attention from time to time to the defendants' policy of delaying the case. In 1893 he reminded Congress that one of the patents had expired and the expiration of the other was imminent, and he quoted Whitman's justification for pressing the case further. More than eighty thousand dollars had been spent on counsel fees and he estimated that five thousand would be spent annually thereafter. In 1895 Attorney General Harmon again called attention to the heavy expenditures and doubted the advisability of pressing the case further. Instead of ordering its dismissal, he "earnestly" asked Congress for directions."

It was by no means customary for an Attorney General to ask congressional advice on the disposition of cases, particularly when instituted on the request of another department. This, however, was no usual case. It had its beginning during the regime of Attorney General Garland, had carried on through the service of Miller and Olney, and was now the responsibility of Judson Harmon. Its history had been one of delay and defeat. The expenditures for counsel fees, witness fees, and other items had been large. Procedural delays might keep the case pending many more years, and even then a final victory might be utterly empty. Yet an Attorney General taking upon himself the responsibility for the dismissal of the suit would incur the hostility of those opposed to the Bell interests or to all great corporations.

<sup>47</sup> *U. S. v. American Bell Telephone Co.*, 167 U. S. 224 (1897).

<sup>48</sup> Whitman to Olney, Sept. 26, 1893, D. J. File 6921-1885.

<sup>49</sup> Ann. Reps. Atty. Gen. 1893, 16, and 1895, 22.

Congress was as fearful of the issue as the Attorney General and showed no inclination to assume the responsibility. Another year passed. The Attorney General reported that the government's rebuttal testimony was almost concluded. Whitman had died, and Harmon did not feel justified in employing other counsel. "In my judgment, this suit should be terminated on the best terms obtainable as to costs," he stated. "I know of no reason why the Government, more than a private person, should waste money in litigation when its uselessness has become apparent." He arranged that the case be left inactive and once more asked Congress for directions.<sup>80</sup>

Congress again failed to advise. Apparently the best way to deal with the embarrassing and unmanageable controversy was to let it alone. The case remained on the docket for ten more years, until on January 1, 1906, it was dismissed without prejudice and without costs. When in 1915 the clerk of the court in Boston wished to clear his files, Solicitor General Davis authorized the surrender of the twelve thousand pages of testimony to the Bell company.<sup>81</sup> This was the final event in the inglorious story of an ill-fated effort begun thirty years before.<sup>82</sup>

The Bell interests, represented by the American Telephone and Telegraph Company, continued to dominate the field. In rural areas, however, thousands of independent companies pioneered. As these became established, the Bell company turned its attention to them. In 1909 an agent of the Department of Justice described the company's methods as checking on the business and earning capacity of each independent exchange, securing a few toll stations in a local city or town, taking a part in the local elections, obtaining a franchise for a complete new telephone service from the local aldermen or council, and then entering into competition with the local exchange or purchasing

<sup>80</sup> *Id.*, 1896, 23.

<sup>81</sup> Swan to Anderson, June 28, 1915, D. J. File 6921-85-1; Davis to Anderson, Aug. 27, 1915, *ibid.*; Rogers to Davis, Sept. 4, 1915, D. J. File 6921-85-3; Davis to Anderson, Sept. 14, 1915, *ibid.*

<sup>82</sup> The Department of Justice having been defeated in its efforts to void the patent, the issue was left to be raised in an infringement suit brought by the Bell company against the National Telephone Manufacturing Company. The Circuit Court found the Berliner patent invalid because it had been anticipated in every respect by other patents. The Circuit Court of Appeals found the Berliner patent valid, if narrowly limited, but held that as so limited there was no infringement. *American Bell Telephone Co. v. National Telephone Mfg. Co.*, 109 Fed. 976 (1901) and 119 Fed. 893 (1903). The case was not taken to the Supreme Court.

it." Yet there were over twelve thousand non-Bell companies in 1908, operating over four million telephones, as compared with some three and a half million Bell telephones. In 1913 there were said to be twenty thousand independent companies, with an investment approximating that of the American Telephone and Telegraph Company."

The independents were providing competition in long distance service by connecting their lines. This form of competition the Bell interests met by buying here and there independent companies which constituted necessary links in the chain and cutting off connection with independents on either side. To prevent these and other mergers with the Bell company, the independents organized state associations and a national association which by lawsuits defeated some mergers as in violation of state laws. Their efforts, however, were effective only within a narrow range.

Finally the American Telephone and Telegraph Company, through its president, announced a policy of amalgamating telephone companies. "This process of combination will continue," he declared, "until all telephone exchanges and lines will be merged either into one company owning and operating the whole system, or until a number of companies with territories determined by political, business, or geographical conditions, each performing all functions pertaining to local management and operation, will be closely associated under the control of one central organization exercising all the functions of centralized general administration." "

After this policy had become clear, and after the government had won notable victories over oil and tobacco combinations under the antitrust laws, petitions began to pour in to the Department of Justice to take action against the telephone organization. The petitions also complained of the domination of the Western Union Telegraph Company by the American Telephone and Telegraph Company, in both of which the same man acted as president.

The Department was finally stirred to action. One of the com-

" Clyatt to Russell, June 3, 1909, D. J. File 60-1-0, Sec. 1.

" Grosvenor to Bonaparte, Dec. 2, 1908, *ibid.*; Memoranda, The Telephone Trust, May 7, 1913, *id.*, Sec. 4.

" Ann. Rep. Atty. Gen. 1914, 13.



plainants, John H. Wright of Jamestown, New York, in 1913 gave an account of the beginning of his interest in the matter. "Fifteen years ago I was conducting half a dozen country weekly newspapers from a small town in Pennsylvania, and the Bell Telephone Company having refused to extend its lines to the villages in which I was publishing these newspapers, compelled me to build lines of my own to connect them, thus, unconsciously, I entered the Independent telephone business," he wrote. "Very shortly after these lines were completed, neighbors and friends wanted connection thereon and within three years after I built the first line I found my telephone business had outgrown my newspaper business. I gave up the latter and have since been devoting my whole time to the telephone industry, with the result that I am now interested in twelve exchanges located in the states of New York and Pennsylvania, representing an investment of nearly a million dollars and these companies are furnishing service to more than eight thousand subscribers, and own in addition a comprehensive toll line connecting these systems." He estimated that twenty thousand other independent telephone companies in the United States had started under similar conditions of necessity.<sup>56</sup>

The Department sent one of its agents to interview Wright at Jamestown. Soon there was an investigation throughout the East and Middle West. In the meantime, the American Telephone and Telegraph Company continued its policy of acquiring independent properties. Attorney General Wickersham requested the Bell company to suspend further action until after the completion of the investigation. N. C. Kingsbury, vice president of the American Telephone and Telegraph, accepted the suggestion.<sup>57</sup>

When the results of the investigation were submitted, the presidential campaign of 1912 was under way. The Attorney General felt there was no reason for a suit under the antitrust laws and transmitted the materials of his investigation to the Interstate Commerce

<sup>56</sup> Wright to Tumulty, Mar. 11, 1913, D. J. File 60-1-0, Sec. 5.

<sup>57</sup> Wickersham to Kingsbury, Aug. 6, 1912, *id.*, Sec. 3; Wickersham to Fowler, Aug. 29, 1912, *ibid.* George W. Wickersham (1859-1936) was born in Pittsburgh, graduated from the University of Pennsylvania Law School, entered into a lifelong law partnership with Henry W. Taft in New York City, and was appointed Attorney General of the United States (1909-1913) by President Taft. Thereafter he was actively interested in public affairs of state, national, and international scope. See *New York Times*, Jan. 26, 1936.

Commission for a broader inquiry."<sup>88</sup> The independent companies were dismayed. They felt that Wickersham had deserted them and evaded responsibility. After the election, the officers of the new administration were subjected to a barrage of complaints from Wright and other representatives of independent interests.

The situation remained largely unchanged throughout most of 1913. One antitrust suit was instituted against the American Telephone and Telegraph Company in Portland, Oregon, where the facts were believed to be especially favorable."<sup>89</sup> This suit moved the company to seek an arrangement with the Department of Justice. Conferences were held. At the same time, by correspondence and interviews, the Department sought to determine from the independents what arrangement would protect their interests. Finally, on December 19, 1913, Kingsbury addressed to the Attorney General a letter embodying the outlines of a suggested policy.

The company agreed to dispose of its stock in the Western Union Telegraph Company so that control and management would be entirely independent; not to make any further acquisitions, directly or indirectly, of competing telephone systems; and to connect its long distance wires with the local exchanges of independent companies. In short, except for the long distance provision, it accepted the *status quo* as the situation under which it would operate in the future, and the government tacitly agreed not to make past conduct a basis for litigation."<sup>90</sup>

Like the railroads, telephone and telegraph communication, to which the new field of wireless or radio communication was soon to be added, came under a measure of public regulation as to rates and services. In accord with the growing belief that telephone corporations, like other utilities, might properly consolidate for purposes of economy, Congress in 1921 permitted the merger of telephone properties upon the approval of the Interstate Commerce Commission, which, in the field of telephone, telegraph, and radio, was superseded thirteen years later by the Federal Communications Commis-

<sup>88</sup> Wickersham to Fowler, Aug. 29, 1912, D. J. File 60-1-0, Sec. 3.

<sup>89</sup> Wright to Wilson, Mar. 11, 1913, *id.*, Sec. 5; see Wright to Wilson, Tumulty, and McReynolds, Mar. 11, 1913, *ibid.*; Todd to Bentley, Sept. 3, 1913, *ibid.*

<sup>90</sup> Ann. Rep. Atty Gen. 1914, 14; and see Gregory to Wilson, Jan. 27, 1917, D. J. File 60-1-0, Sec. 8.

sion. The American Telephone and Telegraph Company came to be the largest commercial corporation in the United States.<sup>81</sup>

<sup>81</sup> 36 Stat. 545, June 18, 1910; 37 Stat. 302, Aug. 13, 1912, as amended; 42 Stat. 8 and 27, May 27 and June 10, 1921; 44 Stat. 1162, Feb. 23, 1927, as amended; 48 Stat. 1064, June 19, 1934; see also the extended materials in House Rep. 1273, 73 Cong. 2 Sess. (1934); by 49 Stat. 43, Mar. 15, 1935, a full investigation in aid of regulation was authorized; Berle and Means, *The Modern Corporation and Private Property* (1932), 3, 18.

## CHAPTER XVI

### THE SPECTRE OF MONOPOLY

ON July 2, 1890, President Harrison signed the now famous Sherman Act, designed, according to its title, "to protect trade and commerce against unlawful restraints and monopolies." This measure made illegal every contract, combination, or conspiracy in restraint of trade or commerce in the interstate or foreign field, as well as actual or attempted monopoly. Property transported across state lines in the course of such illegal acts might be seized by the United States. Criminal penalties were provided, and the circuit courts were also given jurisdiction to restrain violations, upon suits in equity instituted by the district attorneys under the direction of the Attorney General. Private parties, too, might sue for three times the damages they sustained at the hands of anyone who violated the statute.<sup>1</sup>

The demand for the enactment of a law which would curb the power of industrial combinations was first heard in the campaign of 1884, which resulted in the election of Grover Cleveland, the first Democrat to be President since the Civil War. No action was taken then or for some years thereafter, but anti monopoly sentiment continued to grow. The Standard Oil Company was a leader among the combinations which antagonized the proprietors of small business and the public at large. Others were organizations producing sugar, whiskey, and cotton bagging. The Pacific railroads had achieved outstanding unpopularity by this time, and the Bell Telephone Company was reaching a similar eminence.<sup>2</sup>

Early in 1888 a congressional resolution authorized an investigation of the four recognized trusts. A committee investigated, made a non-committal report, and recommended action by "subsequent

<sup>1</sup> 26 Stat. 209, July 2, 1890.

<sup>2</sup> Cong. Rec., 36 Cong. 1 Sess., App. 608, see Chs. XIV and XV, *supra*.

congresses." In a number of states, response to popular sentiment was more immediate. Five states adopted antitrust measures during 1889, and two others passed such laws in 1890 before the approval of the federal act.<sup>4</sup> It quickly became apparent that state legislation would not be effective standing alone. Agitation for federal legislation continued through Cleveland's first administration, and the Sherman bill was swept to enactment during the Republican administration of President Harrison. In terms of the thought of the times on constitutional questions, however, it was no easy task to find authority for federal antitrust legislation. The Interstate Commerce Act of 1887 was then a recent exercise of the commerce power as a basis for positive federal regulation. In debate serious doubts were expressed whether the commerce clause would extend to restraints of trade.<sup>5</sup>

Federal legislation had come a long way since Jefferson anxiously asked whether the states in the Constitutional Convention had committed their "commercial arrangements" to Congress, and since Randolph had warned the Virginians that "particularly in commerce which will probably create the greatest discord" the central government should hold the reins, since Wirt had gaily predicted a commercial and manufacturing nation with "a fleet of thirty sail," and since Taney had railed at the "money monopoly" of the Bank of the United States.<sup>6</sup> Attorney General William H. Miller of Indiana, a close friend and former law partner of President Harrison, undertook the initial enforcement of the new federal statute.

Such steps as were taken during the first year, however, came from District Attorney John Ruhm in Tennessee. He wrote of a combination intended to fix the price of coal in Nashville and asked authority to incur the expense of an investigation. "If, in your judgment, after careful examination, a case can be made against any of the parties named," replied Miller, "then, I take it, it is your duty

<sup>4</sup> House Rep. 4165, 50 Cong. 2 Sess., 1; Sen. Doc. 147, 57 Cong. 2 Sess., 658, 918; see also the exhaustive treatment of state antitrust legislation to 1900 in House Doc. 476, Pt. 2, 56 Cong. 1 Sess.

<sup>5</sup> Cong. Rec., 51 Cong. 1 Sess., 2464 *et seq.*; for a convenient legislative history, see Berman, *Labor and the Sherman Act* (1930), 3-54.

<sup>6</sup> Conway, *op. cit.*, 167 and Ch. 1; Ford, *Pamphlets on the Constitution* (1888), 259, 267; Kennedy, *op. cit.*, II, 17; Swisher, *Roger B. Taney* (1935), 191 *et seq.*

to cause the necessary affidavit to be made, and have an examination before the Commissioner, if that is deemed the proper course." When Ruhm asked if this letter was intended to authorize such suits as might seem justified by the investigation, Solicitor General and Acting Attorney General William Howard Taft replied that specific authorization must be sought from the Attorney General for the institution of each case.<sup>6</sup>

Suit was authorized against the Jellico Mountain Coal Company. Ruhm asked for an assistant, but funds were not available. When Ruhm submitted his brief, Taft prepared a note for Miller's signature. "Your brief seems to be full, and I have no suggestions to be made in regard to the same." The court refused a preliminary injunction, on the ground, among others, that the suit was not brought by a private citizen to prevent injury "but only by the United States on behalf of the public."<sup>7</sup> The court finally held the statute constitutional and granted an injunction.

When in the same year the editor of a prominent newspaper asked Miller what had been done to carry the antitrust act into effect, the Attorney General replied that no special instructions had as yet been issued to all the district attorneys. The validity of the law, about which much doubt had been expressed, had been upheld in Tennessee, he said, and the district attorneys in areas where some of the larger trusts were to be found would soon be instructed to investigate and prosecute, if they could find violations.<sup>8</sup>

On July 2, 1891, one year from the date the President had approved the act, Miller asked a number of district attorneys to examine the new statute carefully. "Lay it alongside any combinations or trusts within your District, and if, by such measurement, it is found that those trusts or combinations are infractions of the law, prosecute vigorously," he directed. "They are great abuses, and if the law can be made to reach them, it is the duty of the law officers of the Government, as I doubt not it will be their pleasure, to do

<sup>6</sup> Ruhm to Miller, Aug. 7, 1890, D. J. File 8247-1890; Miller to Ruhm, Aug. 13, 1890, Instr. Bk. No. 4, 224; Taft to Ruhm, Aug. 23, 1890, Instr. Bk. No. 3, 22.

<sup>7</sup> Taft to Ruhm, Sept. 12, 1890, *id.*, 290; Miller to Ruhm, Mar. 23, 1891, Instr. Bk. No. 11, 148; *U. S. v. Jellico Mountain Coke & Coal Co.*, 43 Fed. 898 (1890).

<sup>8</sup> Miller to Copeland of the *Boston Daily Advertiser*, July 1, 1891, Misc. Letter Bk. No. 3, 340.

everything possible within the law to suppress them, and to punish the wrongdoers." \*

The district attorneys had little or no information as to anti-trust violations but would give the matter their attention. One of them thought it would be wise to seek indictments. "Your plan meets my approval," Miller replied. "The trouble in this business seems to be that while there is a very general feeling that these trusts exist and antagonize public interest, no one seems to have or, at least, be willing to present definite evidence." <sup>10</sup>

When Miller saw a newspaper reference to a glass combine in Pittsburgh, he wrote the district attorney for facts. "Let no effort be spared," he admonished, "to vindicate this law wherever the facts warrant a prosecution." The district attorney asked for more specific information. "I beg to say that I do not now remember in what paper I saw the reference to the alleged violation of the antitrust law by a window glass combine," Miller replied. "However, you will be able, I suppose, to find out the state of matters by inquiry in your city." <sup>11</sup>

He soon became circumspect. "The law is new, and its enforcement is not free from difficulty," he explained. "It is, of course, desirable to proceed with caution." This, he said, was particularly true of criminal proceedings, for it would be unfortunate to make a charge of crime against a person otherwise in good standing and subject him to the humiliation of making a defense "even though in the end he may be acquitted." Doubtful cases should be referred to Washington. But he thought another rule should apply to equity proceedings designed to restrain future violations rather than punish past acts. Equity suits could be used to test the application of the law. "The District Attorney for the Middle District of Tennessee did, I think, institute such a proceeding," he concluded, "and succeeded in it as against some coal trust in that State." <sup>12</sup>

There was a lack of detective facilities in the Department of

\* Miller to Milchrist, July 2, 1891, Instr. Bk. No. 13, 389.

<sup>10</sup> Miller to Reynolds, Sept. 29, 1891, Instr. Bk. No. 16, 62.

<sup>11</sup> Miller to Lyon, Sept. 24 and Oct. 1, 1891, Instr. Bk. No. 15, 339 and No. 16, 93.

<sup>12</sup> Miller to Allen, Feb. 11, 1892, Instr. Bk. No. 19, 324.

Justice. One government agent was sent from point to point to look into various charges,<sup>13</sup> but usually the district attorneys were left to discover the facts. Miller gave incidental attention to a few cases, withholding others to await the outcome of those already pending. Without the zeal of a few district attorneys, such as Ruhm in Tennessee, Milchrist in Chicago, and Allen in Boston, the Sherman Act would have lain dormant during these first years.

Of the seven cases instituted, four of which were equity and three criminal actions, only two were concluded in Harrison's administration. The Tennessee coal case resulted in victory, and a whiskey trust proceeding ended when the district court held that the government had not stated sufficient facts in the indictment.<sup>14</sup> Actions were left pending against sugar, lumber, cash register, and railroad freight combinations. Complaints had been made against many others.

In 1893 President Cleveland returned to Washington for his second administration and selected Richard Olney of Massachusetts to be Attorney General. Olney was stern and dogmatic. In his personal dealings, says his biographer, he was the victim of "lockjaw of the will."<sup>15</sup> He was counsel for the Chicago, Burlington and Quincy Railroad, and in his general practice had appeared successfully against the government in the whiskey trust case.

When offered the position of Attorney General, Olney consulted the president of the road. "Among other things that I want to find out is where I am going to stand with my present clients," he wrote. "I am not a millionaire and cannot take any office of the sort without a good deal of pecuniary sacrifice—just how much I should like to ascertain." The president of the road urged him to accept, "It shall make no difference in our relations except such as you may think it expedient to make." The matter was discussed at Olney's law office. "If the two are not incompatible," a member of the firm wrote, "it seems to me rather for our advantage to have him at Washington." A prominent newspaper carried the story that Olney had accepted the cabinet position with the understanding that he

<sup>13</sup> Miller to Ingham, Oct. 1, 1892, Instr. Bk. No. 25, 16.

<sup>14</sup> *U. S. v. Greenhut*, 50 Fed. 469 (1892).

<sup>15</sup> James, *Richard Olney* (1923), 20.



was to retain his position as corporation counsel for a year, and then choose between the two positions.<sup>16</sup>

Three months after he took office, he wrote Secretary of the Treasury Carlisle that the bankers, merchants, and others of Boston were willing to put some work and money into the repeal of the Sherman Act. He asked for a list of senators "who ought to be persuaded to see the thing in the right light,"<sup>17</sup> but he and his Boston friends were unable to provide sufficient illumination to bring about the repeal of the law.

Olney then insisted on a narrow interpretation of the statute. "As all ownership of property is of itself a monopoly, and as every business contract or transaction may be viewed as a combination which more or less restrains some part or kind of trade or commerce, any literal application of the provisions of the statute is out of the question." There was, said he in his first annual report to Congress, small basis for the popular impression that the statute prohibited large aggregations of capital. "The cases popularly supposed to be covered by the statute are almost without exception obviously not within its provisions, since to make them applicable not merely must capital be brought together and applied in large masses, but the accumulation must be made by means which impose a legal disability upon others from engaging in the same trade or industry." First, the statute was limited to matters of interstate trade or commerce. Second, railroads were not within the act because special and exclusive legislation governed them. Third, it could reach only such restraints of trade as would be void at common law independently of any statute. For this last, he relied upon a decision of Circuit Judge Jackson, who had recently been elevated to the Supreme Court. Yet, he concluded, he would carry one case up to the Supreme Court, in order that the settlement of the question should not rest on the decision of one judge. The Sherman Act was, he said on another occasion, "an experimental piece of legislation."<sup>18</sup>

<sup>16</sup> Olney to Perkins, Feb. 16, 1893, Olney Papers, Lib. Cong.; Perkins to Olney, Feb. 17, 1893, Feb. 18, 1893, *ibid.*; Forbes to Perkins, Feb. 20, 1893, *ibid.*; New York *World*, Feb. 5, 1894.

<sup>17</sup> Olney to Carlisle, July 5, 1893, Olney Papers, Lib. Cong.

<sup>18</sup> *In re Green*, 52 Fed. 104 (1892); Ann. Rep. Atty. Gen. 1893, 27; Olney Memorandum, Olney Papers, Lib. Cong.; and see Ch. XXI, *infra*.

No antitrust cases were initiated during his two years in office. He was hotly indignant when a district attorney and his assistant at Los Angeles, in accord with a general authorization they had asked and received from him in an unguarded moment, began a prosecution of the Southern Pacific; and he promptly directed dismissal.<sup>19</sup> But the sugar trust case, which had been instituted before he came into the Department of Justice, was taken to the Supreme Court. The circuit court had held that the combination in the manufacture of sugar was not a combination in interstate trade and dismissed the bill. The circuit court of appeals agreed.<sup>20</sup> Olney chose this case to test the application of the act in the Supreme Court.

It was argued in the Supreme Court by Solicitor General Maxwell and former Solicitor General Phillips, Olney appearing on the brief with them. They attempted to show the relation between the local manufacture of sugar and interstate distribution to consumers. But, with only one dissenting voice, the Supreme Court distinguished between manufacture and the interstate commerce which followed it, and the Sherman Act was held not to extend to the combination in question. "You will have observed that the government has been defeated in the Supreme Court on the trust question," Olney wrote to his secretary. "I always supposed it would be and have taken the responsibility of not prosecuting under a law I believed to be no good—much to the rage of the *New York World*."<sup>21</sup>

Upon the death of the Secretary of State, Olney was transferred to the Department of State. The President offered the post of Attorney General to Judson Harmon of Ohio, who up to that time seemed to have been known to Cleveland not even by name.<sup>22</sup> Harmon was

<sup>19</sup> *Ibid.*, see also D J File 60-192-9

<sup>20</sup> *U. S. v E C Knight Co.*, 60 Fed 306 and 934 (1894).

<sup>21</sup> *U. S. v E C Knight Co.*, 156 U. S 1 (1895); Olney to Straw, Jan 22, 1895, Olney Papers, Lib Cong

<sup>22</sup> McCullen to Cleveland and Cleveland to Carlisle, June 5, 1895, Cleveland Papers, Lib Cong Judson Harmon (1846-1927) was born at Newtown, Ohio, received his degree from Cincinnati Law School, was elected judge of the court of common pleas and later of the superior court, and was then appointed Attorney General of the United States (1895-1897). Thereafter he served as special commissioner to investigate charges of rebating brought against the Atchison, Topeka and Santa Fe Railroad, took an active part in Ohio politics, served two terms as governor, and was a leading candidate for the democratic nomination for the Presidency in 1912. Dict. Am. Biog., VIII, 276.

a forthright, vigorous, conscientious type of lawyer who took his work seriously.

When, as a result of popular discontent at the non-enforcement of the antitrust law, the House of Representatives called upon him to state what he had done in that direction and to give recommendations for further legislation, Harmon took the opportunity to express his opinions fully. He had investigated and was investigating many complaints. Two actions relating to interstate carriers were now pending. The law ought to be amended, however, to show clearly what Congress meant by monopolies, particularly because of court decisions that the act made nothing illegal which before was not illegal. Something should be done about the efforts of combinations to escape control because of divided jurisdiction between state and federal governments. "The purchase or combination in any form, of enterprises in different States which were competitive before such purchase or combination, should be *prima facie* evidence of an intent to monopolize," he recommended. "This would put the parties to the necessity of explanation, which would supply the information desired."

Furthermore, if the Department of Justice was to conduct investigations under the law, it must have a liberal appropriation for the purpose. It was well known that while it was easy to prove combinations among workmen, because of their numbers and methods, it was another matter to prove combinations and conspiracies among dealers and producers who were few in number and resorted to skilful and secret methods. Yet, as a lawyer, it was hard for him to accept responsibility as a chief of detectives. "I respectfully submit that the general policy which has hitherto been pursued of confining this Department very closely to court work, is a wise one," he concluded, "and that the duty of detecting offenses and furnishing evidence thereof should be committed to some other Department or Bureau." "

Harmon received full sympathy and support from the President.

" Harmon to House of Representatives, Feb. 8, 1896, Ex. and Cong. Letter Bk No. 25, 204; see also Ann. Rep. Atty. Gen. 1896, Exhibit 1.

Secretary of State Olney prepared a draft of a statement on the trust question for Cleveland's annual message of 1896, arguing that the powers of the states were adequate to deal with most of the evils in question. Cleveland borrowed generously from Olney's draft and adopted Harmon's recommendations as well.<sup>44</sup>

Harmon worked closely with his district attorneys, expressed full confidence in their judgment, and urged them to take responsibility. Whereas Olney had curbed their activities and made abrupt demands for explanations of conduct, Harmon used over and over again such phrases as "consider this your authority with no further correspondence," "I leave the whole matter to your own judgment, with full authority and discretion," and "I expect you brilliantly to redeem the pledge I have given on your behalf." Such reliance encouraged the kind of initiative displayed by James Bible, district attorney in Tennessee, whose enthusiasm was responsible for the institution of the *Addyston Pipe* case.

One important antitrust action, against the Trans-Missouri Freight Association, reached the Supreme Court during Harmon's term of office. A suit had been brought in 1892 in the district of Kansas to enjoin a contract and combination to maintain freight rates among eighteen western railroads. The circuit court held that the antitrust act did not apply to railroads, since, it reasoned, they were exclusively regulated by the Interstate Commerce Act. The circuit court of appeals, while not answering this question directly, held that the combination did not violate the Sherman Act in any event. Harmon as a private attorney became convinced that the decision was wrong. When he became Attorney General, he looked over the Supreme Court docket for cases which he might argue himself and chose this.<sup>45</sup>

The decision of the Supreme Court, handed down after his retirement from office, favored the government, although four justices dissented. It was a notable victory for Harmon. Justice

<sup>44</sup> Dec. 1896, Olney Papers, Lib. Cong.; Richardson, *op. cit.*, IX, 744-745.

<sup>45</sup> *U. S. v. Trans-Missouri Freight Association*, 53 Fed. 440 (1892), and 58 Fed. 58 (1893), Harmon to MacFarlane, June 2, 1896, Instr. Bk. No. 60, 448.

Peckham, who wrote the opinion of the Court, was the successor of Justice Jackson whose circuit court decision on the Sherman Act, lauded by Attorney General Olney, indicated that had he now participated he would have changed the minority into a majority against the government. The Court held that the antitrust act applied to contracts made before as well as after the date of the act, contrary to another belief expressed by Attorney General Olney.<sup>88</sup> It held that the act applied to railroad combinations, as well as others, and that it applied to all combinations in restraint of trade and not merely those which the Court deemed unreasonable.

The dissenting minority, speaking through Justice White, argued that "restraint of trade" as used in the statute referred only to "unreasonable" interferences. "The act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts," said Justice White. "But this proposition, I submit, is tantamount to an assertion that the act of Congress is itself unreasonable." In short, if the statute were to be construed as changing the common law on monopolies or restraint of trade, then it would be invalid.<sup>89</sup>

Meanwhile, in the circuit court the government had lost District Attorney Bible's case against the combination of companies manufacturing and selling pipe, but won it in the circuit court of appeals where Judge William Howard Taft cited the *Trans-Missouri* case in reply to the contention that the Sherman Act reached no agreements not void and unenforceable at common law. This decision was handed down during the brief period while Joseph McKenna was Attorney General early in the McKinley administration, and the appeal was argued before the Supreme Court in 1899 during the last year of the term of his successor, John W. Griggs, who had been governor of New Jersey. The Supreme Court, where McKenna was now an associate justice, decided unanimously for the government, and the case marked the beginning of a line of decisions lifting the

<sup>88</sup> Olney to Denis, Aug. 1, 1894, Olney Papers, Lib. Cong.

<sup>89</sup> *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897).

restrictions of the sugar trust opinion three years earlier."<sup>88</sup> This decision, together with the *Trans-Missouri* decision, gave promise that the Sherman Act could be made effective.

Attorney General Griggs allowed only one case to be initiated during his term. His replies to letters urging prosecutions reiterated the necessity of acting within the provisions of the law and the jurisdiction of the federal government. While the *Pipe* case was pending he was wont to state that that case would establish a precedent. "I have not deemed it prudent to undertake numerous instances of litigation," he wrote, "which might by the decision of the case already argued be found to be unmaintainable." He felt that the Standard Oil and the Associated Press were not organizations whose business directly affected interstate commerce. Some thought it significant when on his retirement it was announced that he would form a partnership with attorneys for the steel trust."<sup>89</sup>

This ended the first decade of the history of the Sherman Act. The period near the turn of the century was one of amalgamation of railroads and other corporations. The merger movement was welcomed and defended by many. Yet it disturbed the traditional course of small-scale production and trade under competitive conditions. The Department of Justice was flooded with petitions that trusts be investigated and destroyed.

<sup>88</sup> *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898) and 175 U. S. 211 (1899). Joseph McKenna (1843-1926) was born in Philadelphia, moved to California at an early age, turned to law after originally studying for the priesthood, served two terms as county attorney and one as a representative in the state legislature, was elected to the House of Representatives in 1885 and resigned in 1892 when President Harrison appointed him circuit judge. He was appointed Attorney General of the United States in 1897 by President McKinley, served a few months, and was then appointed to the Supreme Court from which he resigned in 1925. Dict. Am. Biog., XII, 87.

<sup>89</sup> Griggs to Norris, July 28, 1899, Misc. Letter Bk. No. 38, 416 (see also Ann. Rep. Atty. Gen. 1899, 20, 28); Griggs to Rice, Mar. 14, 1899, Misc. Letter Bk. No. 36, 469; Acting Atty. Gen. to Rice, Nov. 15, 1898, Misc. Letter Bk. No. 35, 175; Griggs to Bethea, Jan. 17, 1900, Instr. Bk. No. 122, 25; Griggs to Bethea, July 13, 1900, Instr. Bk. No. 130, 62; and see the Springfield *Republican* quoted in the New York *World* April 3, 1901.

John W. Griggs (1849-1927) was born in Sussex County, New Jersey, practiced law in Paterson, was elected to the general assembly, served as city counsel, served two terms in the state senate, was elected governor, and was appointed Attorney General of the United States (1898-1901) by President McKinley. From 1901 to 1912 he was a member of the Permanent Court of Arbitration at The Hague, and he was a prominent corporation lawyer until his death. Dict. Am. Biog., VII, 627.

In 1901 the assassination of President McKinley promoted Theodore Roosevelt to the Presidency. He inherited the cabinet of his predecessor, including Attorney General Philander C. Knox of Pennsylvania, who had with some reluctance given up his highly remunerative position as counsel for the Carnegie Steel Company to take federal office. McKinley's choice of a "corporation lawyer" had been bitterly criticized, and Knox had found it expedient to divest himself of all interest in corporations that might be subject to the Sherman Act.<sup>80</sup>

His attitude was mild as compared with the robust certainties which characterized Roosevelt. Yet Knox felt that there should be legislation to deal with particular evils. "I am perfectly clear if what is called the monied interests of New York do not get over their pout and cheerfully acquiesce in moderate correction at the hands of their friends," he declared, "they are running a great risk of having the administration of affairs thrown into the hands of those who would not deal gently with them." To the chairman of the Senate Judiciary Committee he wrote, "The end desired by the overwhelming majority of the people of all sections of the country is that combinations of capital should be regulated and not destroyed, and that measures should be taken to correct the tendency toward monopolization of the industrial business of the country."<sup>81</sup>

He recommended a measure vigorously supported by the President, the establishment of a commission to gather facts to supplement the inadequate investigative facilities of the Department of Justice, and a Bureau of Corporations was soon created in the new Department of Commerce and Labor. He also recommended and secured a measure to speed the trial of antitrust cases, and in 1903 he asked and secured an appropriation of \$500,000 for special

<sup>80</sup> Knox to Schoonmaker, May 1, 1901, Knox Papers, Lib. Cong. Philander Chase Knox (1853-1921) was born at Brownsville, Pennsylvania, served as United States district attorney, and was president of the Pennsylvania Bar Association. In 1899 he rejected President McKinley's offer of the position of Attorney General but accepted it in 1901. In 1904 he was appointed to the United States Senate, holding the position until 1909, when he became Taft's Secretary of State. From 1917 to 1921 he was again a member of the United States Senate. Dict. Am. Biog., X, 478.

<sup>81</sup> Knox to McPherson, Oct. 22, 1902, Knox Papers, Lib. Cong.; Knox to Hoar, Jan. 3, 1903, Sen. Doc. 73, 57 Cong. 2 Sess., 34.

counsel in antitrust and railroad cases. To keep more of this work in the hands of regular employees of the department, he brought about the establishment of the office of Assistant to the Attorney General, and thereby provided the beginnings of an antitrust unit within the Department of Justice."

Of the five antitrust cases initiated during Knox's term of a little more than three years, two stand out as important—the *Northern Securities* case and the *Swift* case. The former was an action for an injunction against a holding company controlling the Northern Pacific, the Great Northern, and the Burlington railroads. There had been many requests for action against this combination. The President asked Knox's opinion as to its legality. When Knox replied that it violated the antitrust law, Roosevelt directed him to take action. A case was then instituted in a federal circuit court, argued by Knox and James M. Beck who was to be Solicitor General many years later, and won. "I congratulate you, the inspiring and unwavering cause of it all," Knox wrote Roosevelt."

That part of the press which had denounced Knox as a corporation lawyer was loud in its acclaim of the Attorney General. The Northern Securities Company appealed to the Supreme Court, and Knox argued the case alone against an imposing array of counsel, including John W. Griggs, his predecessor in office. The government was again successful, though by the narrow margin of five to four. Even the five majority judges were not in agreement as to their reasons.

Knox, showing that the securities company arrangement provided for unified control of otherwise competing lines, had argued that monopoly which made possible the restraint of trade was illegal whether such restraint had already taken place or not. Justice Harlan, speaking for himself and three others, wrote that any restriction of free competition in interstate commerce was unlawful whether "reasonable" or not. Justice Brewer, who formerly had accepted this doctrine, now announced his conversion to the "rule

" 32 Stat. 825, Sec. 6, Feb. 14, 1903; 32 Stat. 823, Feb. 11, 1903; Ann. Rep. Atty. Gen. 1903, 5; Dodge, *Origin and Development of the Department of Justice* (1929), 69.

" *The Nation*, Feb. 27, 1902; *U. S. v. Northern Securities Co.*, 120 Fed. 721 (1903); Knox to Roosevelt, April 9, 1903, Ex. and Cong. Letter Bk. No. 63, 340.



of reason"; but he thought that the securities company had unreasonably restrained trade and so concurred in the decision against the company. Justice White wrote a long dissenting opinion for himself and three others, arguing that the acquisition of property by the Northern Securities Company was not interstate commerce at all and therefore did not come within the act or within the power of Congress. Of these four, Justice Holmes wrote a second dissenting opinion for himself and the other three. The antitrust act was a criminal statute, he declared. It was an accepted principle of law that before a statute was to be taken to punish that which had hitherto been lawful it must express its intent in clear words. He could see nothing criminal in the purchase of railroad securities. The antitrust act said nothing about combinations in restraint of competition, but only combinations in restraint of trade. Competition and trade were not to him synonymous. "There is no combination in restraint of trade," he concluded, "until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on." \*\*

Roosevelt had recently appointed Holmes to replace Justice Gray. Prior to the appointment, he had written Senator Henry Cabot Lodge a letter which Holmes was to be permitted to see. "I should like to know that Judge Holmes was in entire sympathy with our views," he had stated, after praising Holmes and criticizing some judges. "Judge Gray has been one of the most valuable members of the Court," he had continued. "I should hold myself as having been guilty of an irreparable wrong to the nation if I should put in his place any man who was not absolutely sane and sound on the great national policies for which we stand in public life." It is said that Roosevelt was angered when his appointee aligned himself with the three Democratic judges in opposition to the government.\*\*

With the decision of the majority of the Court, Roosevelt was delighted. "The Northern Securities suit is one of the great achievements of my administration," he wrote the chairman of the Republi-

\*\* *Northern Securities Co. v. U. S.*, 193 U. S. 197 (1904).

\*\* Roosevelt to Lodge, July 10, 1902, Roosevelt Papers, Lib. Cong.; Wister, *Roosevelt: The Story of a Friendship* (1930), 140; Bent, *Justice Oliver Wendell Holmes* (1932), 260.

can National Committee. "I look back upon it with great pride, for through it we emphasized in signal fashion, as in no other way could be emphasized, the fact that the most powerful men in this country were held to accountability before the law." James J. Hill was said to have remarked that the suit made no difference with him except that he now had to sign two certificates instead of one. Roosevelt regarded as another of his great achievements the Bureau of Corporations, which was to accumulate facts about corporation activities. "The peculiar venom the passage of this law has caused among corporations like the Standard Oil," he declared, "is sufficient to show its need." \*\*

While Knox seemed fully committed to the antitrust program, Secretary of War Elihu Root was not in agreement with it. Roosevelt's method of leadership, therefore, was that of "utilizing Knox as the driving force and Root as the brake." With good humor, Roosevelt is said to have dubbed Knox as a "sawed off cherub" in view of his five feet five stature. It was only as Taft's Secretary of State in the campaign of 1912—when Taft and Roosevelt were rivals—that Knox referred to his former chief as prompted by whims and by "imperious, ambitious vanities and mysterious antipathies." \*\*

He left the Roosevelt cabinet in the summer of 1904 to become a member of the Senate, and he took with him a reputation as a "trust buster," largely based on the *Northern Securities* and beef trust cases. Gossip had it that railroads had exerted painstaking effort to get him out of the Department of Justice. Yet in spite of many demands, he had taken no action against oil, steel, and other powerful interests, and in no case had he revealed the hostility to trusts or the complete agreement with the President's program which was to characterize his two successors. He made no attempt to prosecute offenders by criminal action. When asked by resolution of the House of Representatives whether he had instituted criminal prosecutions against the offenders in the *Northern Securities* combination and requested to send papers, documents, and other information, he

\*\* Roosevelt to Cortelyou, Aug. 11, 1904, Roosevelt Papers, Lib. Cong.; Roosevelt to Interstate Commerce Commission, Oct. 23, 1906, *ibid.*; Roosevelt to Abbott, Sept. 5, 1903, *ibid.*

\*\* Roosevelt to Goddard, Aug. 14, 1902, *ibid.*; Roosevelt to Butler, Aug. 29, 1903, *ibid.*; Bent, *op. cit.*, 256; Pringle, *Theodore Roosevelt* (1931), 562.

replied, "I have the honor to say that no criminal prosecutions have been instituted against the persons referred to in the Resolution, and that, further than this, I do not deem it compatible with the public interest to comply with the Resolution." \*\*

When Knox resigned, Roosevelt shifted William H. Moody of Massachusetts from the Navy Department to the position of Attorney General. Moody was an able trial lawyer who had served many years in political office as well. He was a robust, pugnacious man of the Roosevelt type. "I have grown to like and respect him more and more," Roosevelt said in 1903. "He is one of the strong men in public life and a first class fellow to boot." \*\*

Moody accepted the office with the idea of holding it only for the six months remaining of that term, but he remained for two and a half years until Roosevelt appointed him to the Supreme Court. He supervised the initiation of no less than eighteen antitrust cases. Moreover, Moody was an enthusiast for criminal procedure, and eleven of his cases were criminal prosecutions. "Great though Knox's service as Attorney General was, your service has been even greater," said Roosevelt with approval. "The result has justified you amply." The anti-monopoly press welcomed the change. "It is time," applauded the *New York World*, "that a violation of the Sherman Act was treated as something more than a kindly admonition to go and sin no more." \*\*

During his first few months in office, however, some thought Moody had been instructed to tread carefully where action might have repercussions in the coming election. Roosevelt wrote the chairman of the Republican National Committee that the lesson of the *Northern Securities* case must not be weakened, but, he declared, "Moody is to do nothing without my full knowledge and con-

\*\* *New York World*, June 11, 1904; Knox to Speaker of the House of Representatives, April 27, 1904, D. J. File 18429-01.

\*\* *Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge* (1925), II, 16. William Henry Moody (1853-1917) was born in Newbury, Massachusetts, studied at Harvard Law School, served in Congress, was appointed Secretary of the Navy by Theodore Roosevelt, and upon the resignation of Knox in 1904 served as Attorney General. In 1906 he was appointed to the Supreme Court, from which he resigned in 1910 because of ill health. Wiener, *Life and Judicial Career of William Henry Moody* (Harvard Law School thesis, 1930), and Dict. Am. Biog., XIII, 107.

\*\* Roosevelt to Moody, July 21, 1906, Roosevelt Papers, Lib. Cong.; *New York World*, Jan. 5, 1905.

sent."<sup>41</sup> After some months of investigation, Moody initiated his first case in December 1904 against the paper trust, a combination of manufacturing firms which, in selling newsprint to newspaper publishers, divided the market and fixed prices. The press had clamored against the combination. The case came to trial in a federal court in Minnesota with James M. Beck and Frank B. Kellogg as counsel for the government. It took two years and a Supreme Court decision to force the officers of the corporations to disclose the records.<sup>42</sup>

Counsel for the General Paper Company then hurried to Washington for a conference with the Attorney General. They proposed to consent to a decree rather than open their records to examination. James M. Beck warned that they should first make full disclosures. "If full answers are thus given," said he, "we may be justified in asking for a broader decree than we could at the present time." But Moody allowed the defendants to withdraw their answer and permit the government to win by default, after the major outlines of the decree had been agreed upon with details to be worked out between counsel, or in the event of disagreement, determined by the court.<sup>43</sup> Moody was jubilant. "This afternoon I spent with the representatives of the General Paper Company, the combination in newspaper print against which we began an attack about a year ago," he reported to Roosevelt. "After the recent decision of the Supreme Court adverse to them, they began to get enough and we have this afternoon made a final agreement for the disposition of the case by a full decree for the Government."<sup>44</sup>

The prosecution which attracted most attention during Moody's term was directed against an aggregation of packers in the Chicago area. An injunction had been issued against the combination in a federal court in 1903,<sup>45</sup> but complaints pouring into the Department of Justice indicated that abuses continued.

The Bureau of Corporations, for which the President had great

<sup>41</sup> *Id.*, Aug. 30, 1904; Roosevelt to Cortelyou, Aug. 11, 1904, Roosevelt Papers, Lib. Cong.

<sup>42</sup> *Nelson v. U. S.*, 201 U. S. 92 (1906).

<sup>43</sup> Beck to Purdy, April 21, 1906, D. J. File 60-15-0, Sec. 3; Atty. Gen. Memorandum, May 4, 1906, *ibid.*

<sup>44</sup> Moody to Roosevelt, May 4, 1906, Roosevelt Papers, Lib. Cong.

<sup>45</sup> *U. S. v. Swift & Co.*, 122 Fed. 529 (1903); and see New York *World*, Aug. 1, 1904.

hopes, was investigating the packers during the summer of 1904. The district attorney in Chicago looked into the matter during the same period, with the thought of getting evidence for contempt prosecutions or criminal indictments under the antitrust act. He asked the Attorney General for the assignment of a secret service agent and also asked that the employees of the Bureau of Corporations working in Chicago be directed to give him such information as they had. The secret service agent was provided, but the commissioner of corporations supplied nothing save a list of persons from whom the district attorney might seek information. Upon a further request for assistance, the Department of Justice was astonished when told that the information was confidential in nature, to be used for administrative purposes and not for prosecutions! <sup>46</sup>

Indictments were found early in 1905, but the zest was taken out of the government's case by a report of the Bureau of Corporations exonerating the industry. Moody wrote the President that he was going to Chicago to stimulate the prosecution. "I am satisfied that unless the criminal part of the Sherman Act can be made effective it will accomplish little," he explained. "If, however, people of the importance of these defendants are convicted and imprisoned, it will be a mighty blow against unscrupulous and predatory wealth." <sup>47</sup>

Roosevelt was glad Moody was going to Chicago to take part "in that beef trust business." Moody spent a week with the district attorney. "A good deal of new life has been put into the case," he reported to the President, "and it is the universal testimony that the defendants and their counsel for the first time are thoroughly convinced that the prosecution is in earnest and will go on to the end." <sup>48</sup>

When the action against the packers came to trial in the district court in Chicago in March 1906, the Attorney General was there to

<sup>46</sup> Bethea to Moody, Aug. 16, 1904, D. J. File 60-50-10, Sec. 6; Garfield to Robb, Aug. 22, 1904, *ibid.*; Acting Atty. Gen. to Bethea, Aug. 30, 1904, *ibid.*; Murray to Moody, Sept. 12, 1904, *ibid.*; Acting Atty. Gen. to Bethea, Sept. 14, 1904, *ibid.*

<sup>47</sup> House Doc. 382, 58 Cong. 3 Sess.; Moody to Roosevelt, Aug. 29, 1905, Roosevelt Papers, Lib. Cong.

<sup>48</sup> Roosevelt to Moody, Aug. 31, 1905, *ibid.*; Moody to Roosevelt, Sept. 5, 1905, *ibid.*

take a leading part. The public and the bar, impressed by the prestige of the defendants and by the unusual circumstance of an Attorney General's appearance in a lower court in a criminal case, turned out in large numbers. But it was a sorry experience for Moody. Counsel for the packers submitted the plea that the anti-trust act was suspended as to them because they had been required to give testimony to the Bureau of Corporations. Immunity granted by an act of 1903,\*\* they maintained, had the effect of suspending liability for the acts concerning which they had testified before the Bureau.

Moody, enraged that the Bureau of Corporations report should be used as a barrier against prosecutions, scathingly criticized an interpretation of the law which permitted criminals to escape punishment by confessing their sins. "It is a great discovery of my learned friend for which uncounted generations of captains of industry will thank him," Moody declared scornfully. "Washington will become the Altruria to which they can report for the pardon of their offenses. . . . I can fancy Mr. Swift and Mr. Armour meeting in Washington some other great magnate who had been there and who has washed in what I may call 'Miller's Bath'—because they would go as they go to Carlsbad or to the French Lick Springs in order to cleanse themselves of mis-doing," he continued. "I can imagine them meeting there and saying 'Good morning. Good morning, Brother Rockefeller, have you had your immunity bath this morning?' Look at the absurdity!" This, said the *New York World*, provoked much laughter.\*\*

The court, much to the disgust of Moody and Roosevelt, accepted the defendants' plea. "Such interpretation of the law comes measurably near making the law a farce," said Roosevelt in an indignant message to Congress, "and I therefore recommend that the Congress pass a declaratory act stating its real intention."\*\* No such act was passed, and the Bureau of Corporations continued to be as much of an embarrassment as a help so far as criminal

\*\* 32 Stat. 825, 828, Feb. 14, 1903.

\*\* *New York World*, Mar. 21, 1906.

\*\* Moody to Roosevelt, April 12, 1906, and Roosevelt to the Senate, April 18, 1906, House Doc. 706, 59 Cong. 1 Sess.; *U. S. v. Armour & Co.*, 142 Fed. 808 (1906); *New York World*, Mar. 22, 1906.

prosecutions were concerned. However, the immunity statute was never interpreted as broadly as Moody had feared.

Although in the meantime the Supreme Court had affirmed the decision granting an injunction to prevent the packers from restraining interstate trade," no prosecutions for contempt were instituted. The indictment against the corporations, as distinguished from the officers who had testified before the Bureau of Corporations, was permitted to stand for a number of years before it was dismissed. The so-called beef trust was to provide perennial difficulties for the Department of Justice.

When in the latter part of 1906 Moody was appointed to the Supreme Court, Secretary of the Navy Charles J. Bonaparte of Maryland was shifted to the Department of Justice. Like Moody, he gave loyal and enthusiastic support to his chief in antitrust matters. He carried on the cases begun by Moody and initiated twenty of his own, including thirteen criminal prosecutions, six civil actions, and one libel. The latter, against the tobacco trust, was something new. Roosevelt was elated at the discovery of an unused weapon and congratulated the Attorney General on his plan to seize offenders' property in transit in interstate commerce. "It looks as if we had at last struck a really efficient way of dealing with corporations that insolently defy the law," he wrote to Bonaparte. "I am perfectly delighted with the view that the conservative papers now take to the effect that nothing shows my ingrained lawlessness more clearly than this particular invocation of law." "

The most important case of the period had been initiated by Moody against the Standard Oil Company, after complaints had accumulated for fifteen years. This time the Bureau of Corporations had made a report which seemed to justify proceedings under the antitrust act and also under the Elkins Act against railroad rebates. It was in the rebate case that Judge Kenesaw Mountain Landis won public attention and praise from Roosevelt by fining the Standard Oil of Indiana \$29,000,000, only to be reversed by the circuit court of appeals. "I feel pretty ugly over that decision,"

" *Swift & Company v. U. S.*, 196 U. S. 375 (1905).

" Roosevelt to Atty. Gen., July 10, 1907, Roosevelt Papers, Lib. Cong.

Roosevelt wrote Bonaparte. "The reduction of the fine would have been all right, but the action of the court amounts precisely and exactly to saying that the biggest criminals in this country should be shielded and the law of Congress nullified and that it should be done in the most adroit and meanest of ways; that is that it should be done by so deciding that the law become really ineffective instead of declaring it unconstitutional." <sup>84</sup>

In the prosecution of the antitrust case the department encountered in the Standard Oil Company an opponent which taxed all its resources. To the exasperation of special counsel Kellogg, who was to become Secretary of State seventeen years later, the company caused incessant delays and secured repeated extensions of time for the taking of testimony. Its repeated requests to let bygones be bygones and its offers to submit to the arbitration of the commissioner of corporations and an associate were met with steady refusals. The case was still pending when the Roosevelt administration left office. <sup>85</sup>

Determined to make no concessions and receive no favors, Roosevelt was indignant when he heard that contributions for the Republican campaign of 1908 had been asked from a Rockefeller partner along with other men of wealth. "I protest most earnestly," he wrote, "against men whom we are prosecuting being asked to contribute to elect a President who will appoint an Attorney General to continue these prosecutions." Yet Roosevelt directed Bonaparte to reduce antitrust enforcement to the minimum during the presidential campaign. <sup>86</sup>

Bonaparte had enjoyed many encounters with the press in wielding the Sherman Act under the drive of his chief. One technical problem began to become apparent during his term. It was difficult to secure legal proof of many practices, particularly those arranged by "gentlemen's agreements" and kept secret. Moreover,

<sup>84</sup> Senate Doc. 428, 59 Cong. 1 Sess.; Roosevelt to Sims, Aug. 5, 1907, Roosevelt Papers, Lib. Cong.; *U. S. v. Standard Oil Co.*, 155 Fed. 305 (1907), and 164 Fed. 376 (1908); Roosevelt to Bonaparte, July 25, 1908, Roosevelt Papers, Lib. Cong.

<sup>85</sup> Kellogg to Bonaparte, Nov. 23, 1908, D. J. File 46330-17; Roosevelt to Lee, Jan. 13, 1908, Roosevelt Papers, Lib. Cong.; Bonaparte to Standard Oil Co., Oct. 25, 1907, Bonaparte Papers, Lib. Cong.

<sup>86</sup> Roosevelt to Sheldon, Sept. 21, 1908, Roosevelt Papers, Lib. Cong.; Roosevelt to Bonaparte, Aug. 12, 1908, Bonaparte Papers, *ibid.*



those against whom the department proposed to proceed asked, "Suppose you get a decree that our combination is unlawful, what are you going to do about it then? How can you enforce it?" To make matters worse, the Department of Justice was without a force of agents to detect offenses or violations of decrees."

Although Taft entered the Presidency under pledge to carry out the Roosevelt policies, there was nevertheless a pronounced change. Roosevelt had dominated in matters of policy, directed many individual activities, and turned law enforcement into a series of dramatic incidents. Taft left antitrust enforcement largely to his Attorney General, George W. Wickersham, an able and independent lawyer from New York. Wickersham's selection was said to be due in part to his professional connection with Henry W. Taft and in part to the support of Philander C. Knox who was appointed to the position of Secretary of State." He had served corporations as their counsel, and now he set about with quiet and efficient industry to serve the United States.

Taft had thought of appointing Wickersham as Attorney General and Frank B. Kellogg as Secretary of Commerce and Labor in charge of the Bureau of Corporations, in order to bring about a degree of cooperation which Roosevelt had not been able to achieve. "What we shall have to do is to reorganize the Department of Justice, the Department of Commerce and Labor, and the Interstate Commerce Commission with a view to a more harmonious cooperation in the enforcement of an amended antitrust law," Taft wrote to Knox, "and I need a Cabinet of as many experienced lawyers as I can get to draft the statutes for Congressional consideration in December 1909." "

Wickersham drafted a bill providing for the federal incorporation of firms doing business in interstate commerce, as previously recommended by Roosevelt and by the commissioner of corporations; but it failed to become a law. The measure resulting in the

<sup>87</sup> Purdy, Memorandum on the Paper Trust, undated, Roosevelt Papers, *ibid.*; Bonaparte to Roosevelt, June 24, 1907, Bonaparte Papers, *ibid.*; Bonaparte to Roosevelt, Jan. 14, 1909, Roosevelt Papers, *ibid.*; Ann. Reps. Atty. Gen. 1892, 19-20; 1896, 27; 1903, 5; 1905, 19-20; 1906, 6-7; 1907, 3, and 1908, 7, but compare *id.*, 1911, 6-7 and 1912, 14-15; see Ch. XVIII, *infra*.

<sup>88</sup> See the *New York Times*, Jan. 26, 1936, and the *Nation*, Aug. 3, 1916.

<sup>89</sup> Taft to Knox, Dec. 22, 1908, Knox Papers, Lib. Cong.

creation of the short-lived commerce court was also sponsored.\*\* These made no appreciable difference in the major tasks of antitrust enforcement. While there was no great improvement in interdepartmental relations, the Department of Justice was reorganized by Wickersham, and he sought to make antitrust and other interstate commerce legislation effective.

Sixteen cases from the preceding administration were carried to a conclusion, and eighty additional cases were initiated and most of them terminated while Wickersham was at the head of the Department of Justice. For this unprecedented volume of antitrust business, the Attorney General found it necessary to delegate much responsibility to the Assistant to the Attorney General. Yet Wickersham kept track of all activities.

He took particular interest in the *Standard Oil* and *Tobacco* cases, and worked closely with the Special Assistants Frank B. Kellogg and James C. McReynolds who respectively had them in charge. Both cases were argued twice before the Supreme Court, and Wickersham participated on each occasion. The United States won unanimous decisions in both cases. Chief Justice White spoke for the majority, which now adopted his "rule of reason." Justice Harlan, the last remaining adherent of the doctrine that the antitrust act prohibited all restraints of interstate and foreign trade and not merely those which were "unreasonable," protested the language of the opinion. These opinions called attention to the broad discretion reserved by the majority of the Court in antitrust cases.<sup>81</sup>

Wickersham was elated. "I heartily congratulate you," he wired McReynolds, "on the decision rendered today in the Tobacco case, which in a most sweeping manner sustains the position you have taken throughout." When Kellogg wrote him about the *Standard Oil* decision, he replied with boyish exuberance, "'Us lets congratulate we'; there is glory enough for all. My only regret is that as the titular head of the Department I get really more credit than

<sup>80</sup> Federal incorporation was much discussed and recommended following the submission of the *Final Report of the Industrial Commission*, 1902, 19 Rep. Ind. Comm. 644-645, 645, 651-652, 720; on the Commerce Court, see *New York Times*, Jan. 26, 1936.

<sup>81</sup> Wickersham to Milburn, Nov. 9, 1910, D. J. File 60-57-0, Sec. 1; *Standard Oil Co. v. U. S.*, 221 U. S. 1 (1911); *U. S. v. American Tobacco Co.*, 221 U. S. 106 (1911).

my share. The Tobacco case, following on the heels of the Oil case, gives us such a comprehensive elucidation of the statute that I think now we can shape a policy with some degree of confidence." In his annual report he called them "important and epoch-making." \*\*

The unscrambling of the tobacco companies, as directed by the decree, promised to be so difficult that counsel were given a period of six months during which to work out a plan. Wickersham supervised the negotiations for the government. Relying heavily upon a report made by an agent of the Bureau of Corporations,\*\* he accepted a plan whereby the tobacco business was to be divided among fourteen separate companies. The plan would not result in a complete disintegration of the combination, and it was criticized in many quarters. Wickersham adjusted his comments to the character and station of the critic. "I greatly regret that you feel constrained to withdraw your approval of my actions in the matter of the Tobacco Trust," he replied to one letter, "but I shall have to struggle on as best I may without it." \*\*

Former Attorney General Wayne MacVeagh felt strongly on the subject. "In truth they cherish a besotted affection for rich men *qua* rich men and for robbery by them as praiseworthy," declared MacVeagh, speaking of the circuit judges. "Of all the vulgar low-down thievery in this horrid devil's dance of the last twenty years, defying alike the laws of God and man, this seems to me the worst—and yet I must be wrong or you would not let them go 'scot-free.' " \*\*

"The Government was between Scylla and Charybdis," Wickersham replied. "On the one hand, it was necessary to compel such a disintegration of the unified control possessed by the combination as would restore competitive conditions; and on the other, to avoid throwing the business into a receivership, which would have played the devil generally with business, and, furthermore, would have resulted in the ultimate benefit of the very men who brought about the illegal combination, as they were the people who had the largest

\*\* Wickersham to McReynolds, May 29, 1911, D. J. File 60-20-0, Sec. 9; Wickersham to Kellogg, June 1, 1911, *ibid.*; Ann. Rep. Atty. Gen. 1911, 3.

\*\* Wickersham to MacVeagh, Nov. 16, 1911, D. J. File 60-20-0, Sec. 13.

\*\* Wickersham to Gitterman, Nov. 7, 1911, *id.*, Sec. 12.

\*\* MacVeagh to Wickersham, Nov. 14, 1911, *id.*, Sec. 13.

resources and could, under those conditions, have gone to the receiver's sale and have bought in all the desirable properties, put them into a new corporation and gone on with the business." \*\*

The arrangement was also sharply criticized in Congress as a virtual surrender to the tobacco monopoly. To this Wickersham made no direct reply,\*\* and the adequacy or the enforcement of the decrees in both the oil and tobacco cases continued to be debated for many years.

Antitrust enforcement was much discussed in the vitriolic presidential campaign of 1912, and both the Progressives and the Democrats found little good in Republican achievements. At large the decrees were criticized because the independent units into which the combinations were broken continued to grow and prosper, absorbing small-scale independent business units. But that was an experience common to most efficiently conducted businesses of the period when the premium was on mass production and on the distribution of widely advertised brands.

With the *Standard Oil* and *Tobacco Trust* victories won, the advocates of stern antitrust enforcement were eager to see criminal prosecutions against the individuals responsible for the combinations. On this Wickersham was doubtful from the beginning. The real question, he wrote Kellogg, was whether the government could convince a grand jury and then a trial jury in a criminal proceeding where the proof required was much greater than in civil cases. "Of course," he concluded, "a good many people have the idea that the Government prosecutor can walk up to a court and present the decision of the Supreme Court in the civil suit and take out a conviction for the violation of the crimes portion of the statute, and send Messrs. Rockefeller et al. to Atlanta by the next train." \*\*

The day before, at a congressional hearing on the expenses of the Department of Justice, Wickersham had discussed criminal proceedings, attributed their failure to the hesitancy of juries and courts, and indicated that he did not himself believe in being unduly

\*\* Wickersham to MacVeagh, Nov. 16, 1911, *ibid.*; and see Ann. Rep. Atty. Gen. 1911, 6.

\*\* Cong. Rec., 62 Cong. 2 Sess., App. 125-128.

\*\* Wickersham to Kellogg, June 1, 1911, D. J. File 60-20-0, Sec. 9.

harsh. "I do not believe that the great leaders, who have been successful in vast industries, are conscious lawbreakers," he declared. "I think that when this law comes to be thoroughly known and understood there will be an honest compliance with it." <sup>99</sup> Wickersham began no criminal action against the oil and tobacco people. When a House resolution asked whether he contemplated doing so, he replied that in his opinion it was not compatible with the public interests that he should answer the question. <sup>100</sup> This answer provoked sharp criticism in Congress, but he did not alter his course.

After the victories in the oil and tobacco cases, more equity cases were instituted, of which the most important involved the United States Steel Corporation. During the Roosevelt administration, Elbert H. Gary and Henry C. Frick of the Steel Corporation had called on the President in Attorney General Bonaparte's absence to discuss the acquisition of the Tennessee Coal and Iron Company. As an immediate economic proposition they did not want it, they declared, but they were willing to buy it in an effort to prevent a panic and a general industrial crisis. They wished to know whether the purchase would be regarded by the administration as within the law. Roosevelt, with characteristic enthusiasm for public-spirited gestures, told them to go ahead. During Taft's administration, the altruism of the Steel Corporation was thought to be no more at best than a minor motive, and Roosevelt's own action was called in question when suit was begun against the Steel Corporation. <sup>101</sup> Roosevelt was angered at the criticism, and it widened the growing rift between him and Taft. The case dragged on for many years.

Other antitrust proceedings were terminated successfully under Wickersham's direction, not by prosecuting to decision but by entering decrees with the consent of the parties. Thus the device of the "consent decree" came into the antitrust field as a modification of the tendency of defendants to default in cases where they had no hope of winning or where other reasons made a contest unwise. <sup>102</sup> The

<sup>99</sup> *Hearings Before the Committee on Expenditures in the Department of Justice, on H. R. No. 103 (1911)*, 65.

<sup>100</sup> House Doc. 69, 62 Cong. 1 Sess.

<sup>101</sup> Roosevelt to Bonaparte, Nov. 4, 1907, Roosevelt Papers, Lib. Cong.; Mark Sullivan, *Our Times: The War Begins* (1932), 464-465; the *Nation*, April 22, 1909.

<sup>102</sup> See *U. S. v. Federal Salt Co.*, D. J. File 60-40-0; *U. S. v. General Paper Co.*, D. J. File 60-15-0; *U. S. v. Nome Retail Grocerymen's Assn.*, D. J. File 60-4-2.

defendants, of course, first negotiated with government counsel as to the provisions of the decrees. Of the forty-seven equity cases initiated during the Wickersham period, nineteen ended in consent decrees, ten during the Wickersham period and the others later.

Of these, the Wickersham consent decree against the Aluminum Company of America was of greatest interest in terms of importance and the controversy it provoked. Complaints of competitors had moved the Department of Justice to investigate the Aluminum Company. Aware that prosecution was imminent, its president and counsel sought an interview. As the company had requested, there was then prepared in the Department of Justice a list of changes to be made in business contracts and business methods as a basis of adjustment. "Of course," company counsel was told, "this communication only looks to an amicable settlement of the matter, and if it should become necessary to bring action before an adjustment is agreed upon, it is quite probable that the United States will present other features for the consideration of the court which are not contained in the communication submitted herewith."<sup>73</sup>

The president of the company objected to the formal entry of a decree. It would put the company in the position of self-confessed criminals, he said, and he urged a simple agreement between the management and the government. The Assistant to the Attorney General rejected the proposal, since such an understanding might be disregarded by the company. Moreover, he thought, a formal decree would be of value to the company as well as the United States. "Such a proceeding would be evidence that your Company would thereafter be operating in compliance with the law, and the decree would constitute a rule of action for its guidance," he reasoned, "but however that may be, it is the feeling of both the Attorney General and myself that this course must be taken." Finally a decree was entered June 7, 1912.<sup>74</sup> Questions arose almost immediately and continued to arise thereafter for many years, as to whether or not the decree was being violated.

<sup>73</sup> Davis to Chantland, Nov. 22, 1911, D. J. File 60-13-0, Sec. 4; Wickersham to Aluminum Corporation of America, Dec. 20, 1911, *ibid.*; Fowler to Gordon, Dec. 21, 1911, *ibid.*

<sup>74</sup> Fowler to Davis, Jan. 18, 1912, *ibid.*

Wickersham had been forthright and vigorous in antitrust cases. When his mind was made up, he was slow in taking advice even from the President. In the controversy with the United Shoe Machinery Company, for example, he had concluded that criminal actions were justified. Three times he explained his position, but the President would not agree to the institution of criminal prosecutions. "I feel—as I feel in all such cases," Taft replied, "that the civil case ought to be tried first unless there are exceptional circumstances." <sup>18</sup> It so happened that the criminal cases were never tried.

Antitrust enforcement and a cry for supplemental antitrust legislation was injected into the presidential campaign of 1912 by both the Roosevelt Progressives and the Wilson Democrats. Wickersham, with Taft, took a defensive position. He left office March 4, 1913, to give place to James Clark McReynolds of Tennessee. Although the two had at times been in sharp disagreement, Wickersham retired with expressions of confidence in his successor. <sup>19</sup>

On taking office, McReynolds conferred with Wickersham on cases still pending. In negotiating the Kingsbury agreement with the American Telephone and Telegraph Company, he did not insist on a consent decree. "The Administration earnestly desires to cooperate with and to promote all business conducted in harmony with the law," he wrote. "Without abating the insistence that the statutes must be obeyed, it will always welcome opportunity to aid in bringing about whatever adjustments are necessary for the reestablishment of lawful conditions without litigation." <sup>20</sup>

This agreement and statement of policy were variously received by other businesses. A lawyer representing trade associations, who had hitherto tried vainly to secure for his clients a conference with

<sup>18</sup> Taft to Wickersham, Jan. 22, 1912, D. J. File 60-137-1, Sec. 2; Wickersham to Taft, Jan. 23, 1912, *ibid.*; Taft to Wickersham, Jan. 24, 1912, *ibid.*; Taft to Wickersham, Mar. 11, 1912, *id.*, Sec. 3.

<sup>19</sup> New York *World*, Mar. 6, 1913. James Clark McReynolds (1862- ) was born at Elkton, Kentucky, received his law degree from the University of Virginia, became a member of the law faculty at Vanderbilt University, Assistant Attorney General in the Theodore Roosevelt administration from 1903 to 1907, special counsel in tobacco trust cases and other important cases from 1907 to 1912, was appointed Attorney General of the United States in 1913 by President Wilson, and held the position until in 1914 he was appointed to the Supreme Court of the United States. Nat. Cyc. of Am. Biog., Current Volume A, 42.

<sup>20</sup> Letter to the Attorney General from the American Telephone and Telegraph Company (Govt. Printing Off., 1914); and see Ch. XV, *supra*.

the Attorney General to discuss the application of the antitrust act to their activities, wrote again but was told that no such general conference could be held and that only in case some association was charged with violation of the antitrust law would the department confer."<sup>8</sup>

A plan to bring about the separation of the Pennsylvania Railroad from the Norfolk and Western by means of an agreement similar to the Kingsbury letters, however, brought objections from Philander C. Knox and from William A. Day, who had been Assistant to the Attorney General under Knox. Both were now representing private interests. "It is a complete, radical and dangerous power that the Attorney-General is now exercising in relation to the business of the country,—that of accepting confessions and granting indulgences upon his own notions of the meaning and purposes of the law," Knox wrote H. C. Frick. "His decision and any action taken in pursuance of any arrangement with him binds no one, not even himself and certainly neither his successors, the public nor the courts." "<sup>9</sup>

"The head of that department calls upon great concerns to surrender property rights; to come to his confessional and if their attitude in accepting his advice satisfies him, he grants absolution for their past conduct, presumably unlawful, and indulgence for the future," Day wrote Knox. "The consideration of the probable ultimate effect of the establishment of such power in the hands of an administrative, non-judicial officer should give rise to grave concern." "<sup>10</sup>

McReynolds was appointed to the Supreme Court in September 1914. His successor, Thomas Watt Gregory of Texas, served through the period of the World War. The Clayton Act and the Federal Trade Commission Act, supplementing the Sherman Act and creating the Federal Trade Commission, were passed in the latter part of 1914. Both measures were the product of discontent with results under the old law. The Commission was to be a permanent agency,

<sup>8</sup> Levy to Todd, Dec. 20, 1913, D. J. File 60-0, Sec. 6; Todd to Levy, Dec. 23, 1913, *ibid.*

<sup>9</sup> Knox to Frick, Jan. 12, 1914, Knox Papers, Lib. Cong.

<sup>10</sup> Day to Knox, Jan. 13, 1914, *ibid.*; compare Ann. Reps. Atty. Gen. 1913, 17; 1916, 24.



unaffected by political change. It was to take over the functions of the Bureau of Corporations. It was to investigate unfair trade practices and issue cease and desist orders. It was to aid in the difficult task of checking on the observance of court decrees, either on its own initiative or at the request of the Attorney General. Upon the application of the Attorney General, it was to recommend readjustments in the business of any corporation charged with violating the anti-trust statutes, thus removing the necessity for the Attorney General himself to enter informal arrangements. At the request of the courts, it was to serve as a master in chancery in working out decrees in cases won by the government."<sup>1</sup>

The Department of Justice and the Federal Trade Commission then tried to prevent duplication and conflict. Yet misunderstanding and friction developed and prevented the cooperation specified by the terms of the new statute. When the department sought to prosecute a combination of newsprint manufacturers while the commission was attempting to work out a reform of their business procedure, the commission claimed those accused had been assured immunity in return for voluntary cooperation with the commission."<sup>2</sup>

The coming of the World War had diverse effects upon antitrust enforcement. "The capitalization of misfortune and oppression of our own people by the arbitrary increase of the prices of food stuffs," Gregory instructed the district attorneys, "are so peculiarly reprehensible that, whenever convictions can be obtained, the Government should insist upon sentences of imprisonment." "<sup>3</sup> During this as in earlier periods the attempt to inflict criminal penalties failed, though twelve cases were initiated against combinations in the food business.

In spite of wartime conditions, Gregory advised President Wilson against suspending action in cases pending against large combinations. Price extortions were an admonition to more vigorous enforcement, he declared. "If the prosecutions against more powerful com-

<sup>1</sup> 38 Stat. 730, Oct. 15, 1914; 38 Stat. 717, Sept. 26, 1914.

<sup>2</sup> Todd to Morrison, July 7 and Dec. 1, 1915, D. J. File 60-57-9, Sec. 9; Todd to Davies, Dec. 18, 1915, *ibid.*; Davies to Todd, Dec. 27, 1915, *ibid.*; Todd to Federal Trade Commission, Jan. 8, 1916, *ibid.*; Todd to Smyth, Nov. 17, 1915, D. J. File 60-137-1, Sec. 8; Newsprint, D. J. File 60-15-0, Secs. 5-9.

<sup>3</sup> Gregory to Dist. Attys., Sept. 5, 1914, D. J. File 60-57-0, Sec. 10; and see Ann. Rep. Atty. Gen. 1917, 16.

bines are suspended, the Government cannot in good conscience or with any hope of success proceed against smaller offenders," he concluded. "The fact must be faced, therefore, that the suspension of the prosecutions now pending in the Supreme Court would mean the practical suspension of the law altogether." <sup>84</sup>

He was overruled, however, and presented to the Supreme Court a motion to suspend action in cases involving combinations in shoe machinery, farm machinery, steel, kodaks, and other products. The reason given was that, in case of government victory, a great deal of private financing would be required and would compete with the efforts of the Treasury Department to float loans. <sup>85</sup> The activities of trade associations, however, brought on eleven new cases during the period.

Soon after the close of the war came the Supreme Court decision in the long pending case against the United States Steel Corporation. The Court ruled against the government. It held that the mere size of a corporation was not proof of illegal monopoly. The government was required to demonstrate actual restraint of trade and not merely the capacity to restrain. The "Gary Dinners," where tacit agreements were made, were disregarded by the Court since this pleasant form of business meeting had been suspended.

President Roosevelt many years before had approved the acquisition of the Tennessee Coal and Iron Company. "His approval, of course, did not make it legal, but it gives assurance of its legality," explained Justice McKenna, "and we know from his earnestness in the public welfare he would have approved of nothing that had even a tendency to its detriment." Moreover, the government had not brought suit until ten years after the corporation had been formed, during which many millions had been invested. Dissolution of the company would deter foreign trade. The *Standard Oil* and *Tobacco* cases were to be distinguished, for there the methods of the corporations had been "brutal."

Justices McReynolds and Brandeis took no part in the decision. Justices Day, Pitney, and Clarke dissented. They thought it clearly

<sup>84</sup> Gregory to Wilson, Oct. 5, 1917, D. J. File 60-0, Sec. 8; and see Ann. Rep. Atty. Gen. 1918, 60.

<sup>85</sup> Gregory to Choate, Dec. 29, 1917, D. J. File 60-137-1, Sec. 11.

a combination for the elimination of competition. A huge organization born of the "Gary Dinners" and other practices, no matter what its present methods might be, should be made to feel the prohibitions of the law since otherwise it escaped altogether. "I know of no public policy which sanctions a violation of the law, nor of any inconvenience to trade, domestic or foreign, which should have the effect of placing combinations, which have been able thus to organize one of the greatest industries of the country in defiance of law, in an impregnable position above the control of the law forbidding such combinations," said Justice Day for the dissenting three. "Such a conclusion does violence to the policy which the law was intended to enforce, runs counter to the decisions of the court, and necessarily results in a practical nullification of the act itself." \*\*

Attorney General A. Mitchell Palmer, who succeeded Gregory in 1919, had inherited the case from three former Attorneys General and gave it little personal attention. Although a number of prosecutions against trade associations and other combinations were instituted during his term, his personal efforts were devoted largely to one big case.

The meat packers in Chicago, the Swift, Armour, Wilson, Morris, and Cudahy companies, were in a strategic position to control the meat supply for a large portion of the country. They dominated the stockyard markets and market newspapers, had long been objects of attack from farmers, merchants, and consumers, and had been subjected to periodic investigation since the adoption of the Sherman Act. In 1917 the Federal Trade Commission, at the request of President Wilson, made an extensive study of the operations of the packers. It reported that there was only an artificial show of competition. "Some independent packers exist by sufferance of the five, and a few hardy ones have survived in real competition," it concluded. "Around such few of these as remain the lines are drawing in." \*\*

The Commission sent its reports and basic evidence to the

\*\* *U. S. v. U. S. Steel Corporation*, 251 U. S. 417 (1920); followed in *U. S. v. International Harvester Co.*, 274 U. S. 693 (1927).

\*\* Federal Trade Commission, *Summary of the Report on the Meat-Packing Industry* (1918), 6; and see Federal Trade Commission, *Report on the Meat-Packing Industry* (1918).

Department of Justice, and loaned six members of its staff to assist in the contemplated grand jury proceedings. Meanwhile, the packers had become much concerned at adverse publicity which threatened to result in drastic regulatory legislation. Attorney General Palmer then took over much of the responsibility for handling the case when the packers proposed a consent decree in the hope that such a decree would aid in putting an end to public indignation and ward off legislation."<sup>99</sup> Palmer, without consulting the Trade Commission, negotiated a decree and, before it was entered, told a Senate committee that he saw no need for further legislation. The Trade Commission thought the decree quite inadequate, and in 1921 Congress passed the Packers and Stockyards Act providing a degree of regulation."<sup>100</sup>

The proposed decree attempted to divorce the packers from control of stockyard markets, market newspapers, and other facilities. It prohibited them from retailing meat, from handling groceries, and from loaning customers refrigerator cars and equipment."<sup>101</sup> The Attorney General received much publicity and some praise for his efforts to control an unpopular monopoly. When he was criticized because dairy products were not included within the prohibitions of the decree, he was wont to reply that if necessary the matter could be dealt with in a subsequent action. As soon as Palmer was succeeded by Harry M. Daugherty with the advent of the Harding administration, the packers and affiliated interests, by a series of legal maneuvers, managed to avoid the operation of the decree in whole or in part for more than twelve years."<sup>102</sup>

<sup>99</sup> Fort to Palmer, April 9, 1919, D. J. File 60-50-0, Sec. 9; Yoder to Hardy, Oct. 1, 1919, *id.*, Sec. 10; Marsh to Stone, July 8, 1924, *id.*, Sec. 18; Borders to Sargent, Sept. 8, 1926, *id.*, Sec. 22; *Hearings on S. 2199 and S. 2202*, Pt. 4, 66 Cong. 2 Sess., 37, 46; Cong. Rec., 67 Cong. 2 Sess., 2105.

<sup>100</sup> *Hearings*, *op. cit.*, 37; *Hearings Pursuant to Senate Resolution No. 211*, 67 Cong. 2 Sess., 1, 863; 42 Stat. 159, Aug. 15, 1921.

<sup>101</sup> On the proposals within the government for supervision of compliance with the decree, see Palmer to Fisher, Jan. 14, 1920, D. J. File 60-50-0, Sec. 10; Palmer to Murdock, Nov. 4, 1920, *id.*, Sec. 12; Palmer to Thompson, Feb. 28, 1921, and Gaskell to Palmer, Mar. 2, 1921, *ibid.*

<sup>102</sup> *Hearings Pursuant to Senate Resolution No. 211*, *op. cit.*; *California Cooperative Canneries v. U. S.*, 299 Fed. 908 (1924), and 279 U. S. 553 (1929); *Swift & Co. v. U. S.*, 276 U. S. 311 (1928); *U. S. v. Swift & Co.*, 286 U. S. 106 (1932); O'Brien, Memorandum for the Atty. Gen., Nov. 4, 1929, File 60-50-0, Sec. 26; *Report of Hearings Held before Committee Appointed by Secretary of Agriculture In re Packers Consent Decree*, Sept. 3-7, 1929, D. J. File 60-50-0, Enc.; Mitchell to McNary, Feb. 5, 1930, *id.*, Sec. 28.

Meanwhile, the Federal Trade Commission, proceeding independently under the new antitrust acts, found its powers limited in a series of decisions.<sup>13</sup> On one occasion it complained that the Aluminum Company of America, whose leading spirit became Secretary of the Treasury, was ignoring the consent decree of 1912. When the Department of Justice investigated, however, the commission refused to open its records on the ground that the information had been given in confidence.<sup>14</sup>

During the decade of the 1920's the Attorneys General had authorized approximately one hundred forty-eight antitrust proceedings, of which ninety were equity cases. These dealt with oil, sugar, coal, motion pictures, radio, and a host of other products and industries. Investigations of complaints ran into the hundreds each year. During the decade, sixty-nine of the equity cases were terminated successfully, fifty-six by consent decrees and thirteen by court decision. Sixteen equity cases were lost or dismissed. Thirty of the fifty-eight criminal cases were successful, and twenty-seven were lost or dismissed.<sup>15</sup>

There was an unsatisfactory attempt by the Department of Justice to satisfy the long agitated demand for advance approvals of mergers or practices.<sup>16</sup> The principal decisions of the Supreme Court dealt with the legal limits of cooperative endeavors of so-called "loose

<sup>13</sup> See McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission* (1933), Ch. III.

<sup>14</sup> *Report of Federal Trade Commission on House Furnishings Industry* (1924), III; Stone to Seymour, Oct. 18, 1924, D. J. File 60-13-0, Sec. 7; Press Release, Feb. 7, 1925, *ibid.*; Stone, Memorandum to Seymour, Feb. 11, 1925, *ibid.*; Senate Doc. 47, 69 Cong. 1 Sess.; Senate Rep. 177, 69 Cong. 1 Sess.; Cong. Rec., 69 Cong. 1 Sess., 4622; Senate Doc. 67, 69 Cong. 1 Sess.; the *Nation*, April 16, 1930; *New York World*, Jan. 4-17, 21-23, Feb. 2, 6, 20, 27, 1926.

Not until 1936 did the Attorney General exercise his power to call upon the Federal Trade Commission to investigate compliance with an antitrust decree, as the statute had provided for more than twenty-two years, 38 Stat. 717, Sec. 6(c); Cummings to Chairman March, Fed. Trade Commission, April 16, 1936, D. J. File 60-57-35; Commission to Cummings, April 25, 1936, *ibid.*

<sup>15</sup> *Federal Antitrust Laws* (1930), 152-217; and see Ann. Reps. Atty. Gen. for this same period. *Consent decrees*: See Ann. Rep. Atty. Gen. 1926, 33. *Investigations*: *Id.*, 1912, 46; 1913, 6, 45; 1914, 11; 1925, 20.

<sup>16</sup> There was no opportunity—nor could there be—to develop the true state of facts in each matter, and sometimes the approvals were used to cover situations which the Department had no intention of condoning. *Sugar Institute v. U. S.*, 297 U. S. 553, 576 (1936); Donovan, *Some Practical Aspects of the Sherman Law* (1929), Rep. Pa. Bar Assn.; Mitchell, *Address Before American Bar Assn.*, (1929), 16 A. B. A. J. 9, 11-12; Ann. Reps. Atty. Gen. 1926, 33; 1928, 31; 1932, 21.

combinations" and trade associations."<sup>88</sup> Criminal proceedings, except in racketeering cases, had never succeeded, and there had been only one insignificant attempt at confiscation of property as authorized by the Sherman Act.<sup>89</sup> Civil proceedings to prevent future violations of the law had become the rule.

The growth of intricate corporate structures and skilfully managed intercorporate relationships greatly complicated the task of enforcement. Moreover, the basic antitrust statute did not lay down detailed definitions to guide the courts and the officers of the Department of Justice. To the vague "rule of reason" judicial interpretation added a recognition of industrial need for protection against the ravages of malignant competition. "Its general phrases," said the Supreme Court in a leading decision on the Sherman Act after the close of the decade, "do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of . . . commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis."<sup>90</sup>

<sup>88</sup> *Id.*, 1924, 15; *U. S. v. Trenton Potteries Co.*, 273 U. S. 392 (1927); *Paramount Famous Corp. v. U. S.*, 282 U. S. 30 (1930); *U. S. v. First Natl. Pictures, Inc.*, 282 U. S. 44 (1930). *Trade Association Cases: American Column Co. v. U. S.*, 257 U. S. 377 (1921); *U. S. v. American Oil Co.*, 262 U. S. 371 (1923); *Maple Flooring Assn. v. U. S.*, 268 U. S. 563 (1925); *Cement Mfrs. Assn. v. U. S.*, 268 U. S. 588 (1925); *Sugar Institute v. U. S.*, 297 U. S. 553 (1936).

<sup>89</sup> See for earlier experience with criminal cases, *Ann. Reps. Atty. Gen.* 1910, 3; 1912, 15. *Confiscation of property*: See Senate Doc. 79, 69 Cong. 1 Sess., 16.

<sup>90</sup> *Appalachian Coals, Inc. v. U. S.*, 288 U. S. 344, 359-360 (1933).

## CHAPTER XVII

### UNWANTED MEN

DURING the Revolution, General Washington consigned prisoners of war to the burrows of an old mine, which remained the Connecticut prison until 1827. "The horrid gloom of this dungeon can be realized only by those who pass along its solitary windings," said an observer. "The impenetrable vastness supporting the awful mass above, impending as if ready to crush one to atoms; the dripping water trickling like tears from its sides; the unearthly echoes responding to the voice, all conspire to strike the beholder with amazement and horror."<sup>1</sup>

Imprisonment, as distinguished from capital or corporal punishment, was relatively new. A British visitor as late as 1827-1828 remarked that the convicts in the state prisons of America were chiefly such as in England would be executed or banished. William Penn and the Quakers had taken the lead in penal reform, in which later William Bradford, the second Attorney General of the United States, was prominent.<sup>2</sup> All states, however, faced frequent reversals of popular feeling and public policy. In these first prisons men and women, old and young, the insane and the sick, whether confined as debtors, witnesses, persons awaiting trial, or convicted criminals, mingled freely; jailers served liquor to prison patrons; vice was rampant.

For more than a century the American prison was left almost entirely to the states. The First Congress at its initial session recommended that the states pass laws making it expressly the duty of keepers of jails to receive and "safe keep" all federal prisoners at

<sup>1</sup> Lewis, *The Development of American Prisons and Prison Customs, 1776-1845* (1922), with foreword by former Atty. Gen. Wickersham, 64, 65, quotation from Richard Phelps, *History of Newgate Prison* (1827); see Edmonds, *Drums Along the Mohawk* (1936), 99 *et seq.*, 278 *et seq.*

<sup>2</sup> Hall, *Travels in North America in the Years 1827-1828* (1829), I, 36-44, and see also Register of Debates, II, 1475-1491; Bradford, *Enquiry How Far Punishment by Death Is Necessary in Pennsylvania* (1793).

the rate of fifty cents a month for each.\* Most states complied. It was necessary to authorize the marshals of the United States to hire convenient places to serve as temporary jails only where states and counties failed to provide them. Federal prisoners were placed exclusively under the control of state or territorial officers,<sup>†</sup> and their discipline was made to conform to that of state or territorial convicts.

For three-quarters of a century the system of local incarceration sufficed without general exception. In some states, however, the prison systems were hard pressed to care for their own; in others federal prisoners were harshly treated and kept in places that the national government could no longer countenance. Economy forbade the maintenance of federal jails or prisons in each state, but in 1864 the Secretary of the Interior was empowered to contract for the keep of federal prisoners in suitable prisons in convenient states or territories, whenever local facilities in particular judicial districts were unfit or not available. A year later the Secretary was similarly directed to designate "houses of refuge" for federal juvenile offenders.<sup>‡</sup>

While in England the Home Secretary was responsible for the prisons, following the creation of the Department of Justice of the United States the federal territorial prisons in 1871 were placed under the care and control of the local United States marshals, supervised by the Attorney General. The next year the duties of the Secretary of the Interior with respect to the keep of federal prisoners in state prisons were transferred to the Attorney General, who already had charge of the funds for prison purposes and had to call constantly upon the Secretary for prison facilities.<sup>§</sup> A new function had found its way into the national law department and the legislation opened a second stage in the federal prison history—a period

\* 1 Stat. 96, Sept. 23, 1789; Ann. Rep. Atty. Gen. 1882, 14; and see 4 Stat. 115, Sec. 15, Mar. 3, 1825; *id.*, 775, Sec. 5, Mar. 3, 1835; 11 Stat. 2, Mar. 28, 1856; 13 Stat. 500, Sec. 3, Mar. 3, 1865.

† 1 Stat. 225, Mar. 3, 1791; 3 Stat. 646, Mar. 3, 1821; 4 Stat. 739, June 30, 1834. See also Ann. Cong., VII, 433; 4 Stat. 632, Sec. 6, Mar. 2, 1833.

‡ 13 Stat. 74, May 12, 1864; Rep., Sec. Int. to Pres., 1862, Cong. Globe, 37 Cong. 3 Sess., App. 8-9; 13 Stat. 538, Mar. 3, 1865.

§ 16 Stat. 398, Jan. 10, 1871; Atty. Gen. to Sec. Int., 1871, Ex. and Cong. Letter Bk. A, 1-2, 54; 17 Stat. 418, Jan. 24, 1873; Ann. Reps. Atty. Gen. 1873, 14; 1874, 16; 17 Stat. 35, Mar. 5, 1872; Atty. Gen. to Sec. Int., Ex. and Cong. Letter Bk. A, 463; Howard, *op. cit.*, 25-32.



when federal law officers were required to judge of the suitability of local jails and prisons and, in most cases, provide for the transportation of prisoners.

The subsistence of federal prisoners was a substantial source of revenue to sheriffs and wardens, and it was expected that the designated jails and prisons be kept in good condition and the prisoners supplied with "comfortable bedding, and good, well cooked food in sufficient quantity." But once a contract had been made with local authorities, the laws gave the Attorney General no further control over federal prisoners, except that after investigation the local jail or prison could be declared unfit and the prisoners moved to other institutions. There was no provision for regular prison inspection, and examinations were conducted only as circumstances permitted. When evil conditions were exposed, the Attorneys General sought other safe institutions having humane systems of discipline and facilities for protecting the health and securing the reformation of the prisoners. Because public sentiment was so generally opposed to the use of the whip in prisons, they sought, not always with success, only those institutions in which the lash was never used.<sup>7</sup>

The Arkansas state penitentiary, for example, had been leased to a contractor who, in return for the labor of the prisoners, relieved the state of their expense and care. The Attorney General, upon information that the prison had no means of ventilation and that sixty prisoners were confined in one room, requested the district attorney to investigate. To remove the federal prisoners, he reported, would deprive the contractor of over \$10,000 a year. He could not learn much, and was frankly apprehensive of reprisals by the contractor. The Attorney General could only demand reforms and request the district attorney to visit the prison when convenient.<sup>8</sup>

Within a few months the district attorney, spurred by the results of an investigation by the State Board of Prison Commissioners, found courage to report that the arched cells were only five feet high with no possible means of ventilation. Twenty per cent, usually the worst of the convicts, escaped while at work upon plantations. "The

<sup>7</sup> Instr. Bk. U, 204; *id.*, 80. Ann. Reps. Atty. Gen. 1875, 5-6; 1885, 33; 1887, 12; 1894, 11-14; and see: *Id.*, 1879, 17; 1880, 19-20; 1895, 25-26.

<sup>8</sup> Letters of Aug. 14, Sept. 10 and 20, 1875, D. J. Mss. and Instr. Bk. F, 170.

conviction has cost the Government several thousand dollars in each case, when the sordid system of imprisonment," the district attorney stated, "turns them loose upon the public, in a condition of outlawry, worse foes to society than before their prosecution." It was many years, however, before the use of the prison for federal convicts could be discontinued.\*

The federal officers were required to transport Florida and Georgia convicts to Albany, New York. Prisoners from Alaska and Washington Territory were confined in California. Three-fifths of the federal prisoners were confined in the New York and Ohio penitentiaries and the Detroit House of Correction. The expense and difficulties of transporting prisoners grew. To some marshals this duty was merely disagreeable, to others an occasion for petty abuse. Some transported prisoners one at a time in order to increase their fees; others used an excessive number of guards to make what Garland called "pleasure trips."<sup>10</sup>

Attorney General Garland, like Akerman, a southerner, had hesitantly favored secession and served as delegate to the Provisional Congress and in the Confederate House and Senate. He was pardoned by President Johnson, readmitted to the bar of the Supreme Court in the famous proceeding, *Ex parte Garland*, despite legislation excluding those who had held office in the Confederacy, elected to the United States Senate but not allowed to take his seat, elected Governor of bankrupt Arkansas, and was elected to the Senate again. There he espoused flood control and tariff and civil service reform until he resigned in 1885 to become Attorney General in Cleveland's cabinet.

He was well built and tall, his head large and his face round and animated with black, expressive eyes—a man of many eccentricities of manner and method.<sup>11</sup> He was an active lawyer but at the same

\* Dist. Atty. to Pierrepont, Jan. 22, 1876, D. J. Ms.; Ann. Rep. Atty. Gen. 1891, 11.

<sup>10</sup> Instr. Bks. D, 333, 465; C, 601; Z, 267, 518; W, 38; Y, 121; No. 2, 567, 570, 578; Ann. Rep. Atty. Gen. 1891, 11.

<sup>11</sup> Newberry, *A Life of Mr. Garland of Arkansas* (1908), 97, 99; Shinn, *Pioneers and Makers of Arkansas* (1908), 327; *Washington Evening Star*, Jan. 26, 1899, 6. He retired from office to practice law, spending much time in Washington where he died while arguing a case before the Supreme Court. Dict. Am. Biog., VII, 150-151.

time brought to the Department of Justice long experience in public service and turned his attention to the perplexing problem of federal prisoners.

He gave great care to the collection of prison statistics for his annual reports to Congress and during the '80's, in entering into innumerable contracts with local jail and prison authorities, found it necessary to limit expenditures and require strict accounting from the marshals. But, while the marshals might be brought under a measure of control, the local authorities, for the most part, refused to keep federal prisoners except on their own terms.<sup>13</sup> Naturally, there was pressure against interference with this lucrative traffic.

Efforts toward economy did not make local jailers more eager to see that federal prisoners were securely kept. The local jails were notoriously flimsy, their administration lax. Sometimes the United States had to furnish guards, but ordinarily the only course was an appeal to the local authorities. Occasionally, military guards or military prisons were used. To Fort Jefferson in the desolate Dry Tortugas was sent the unfortunate Doctor Mudd for setting the broken leg of John Wilkes Booth. This grim, disease-ridden fortress was also selected to hold the untamable Sioux, Crazy Horse, after he had annihilated Custer's command at the Little Big Horn—but his violent death at the entrance to the guardhouse at Fort Robinson in Dakota Territory occurred before plans for his transportation could be perfected.<sup>14</sup>

Attorney General Cushing had written the Secretary of the Interior, thirty years before, that the state courts on more than one occasion had interfered unwisely if not unlawfully with prisoners held for extradition to foreign countries. "I think it is not convenient to exhibit to foreign nations our weakness in this respect," he said. "Nor would it be graceful that on such an occasion the French Government should be called upon to provide a place of imprisonment for the execution of the laws of the United States."<sup>15</sup>

<sup>13</sup> *Statistics*: Instr. Bks. S, 11, 20, 35, 262; V, 512; Z, 209, 415; No. 3, 87. *Local prison independence*: Instr. Bk. U, 446; X, 267.

<sup>14</sup> *Appeals to local authorities*: Instr. Bks. B, 188; C, 166; D, 450; E, 324. *Military guards and prisons*: Instr. Bks. B-2, 176; C, 240, 376; D, 504; E, 26; England, *Isles of Romance* (1929), 45-46, 48-60.

<sup>15</sup> Feb. 18, 1857, 8 Op. 396.

At times local sentiment or the views of local jailers were opposed to the execution of federal laws. In fugitive slave days, after the Supreme Court had ordered the imprisonment of Sherman M. Booth, feeling ran so high in Wisconsin that he was confined in a room in the customhouse and even there repeated attempts at rescue were made both by force and by appeal to courts for writs of habeas corpus. Upon the establishment of the Department of Justice in 1870, Attorney General Akerman warned of the danger of relying upon the "comity" of states unfriendly to the enforcement of the laws of the United States. The next year he reported the release of a prisoner by a local jailer "for the avowed reason that the law, under which the prisoner was convicted, was disapproved by that functionary."<sup>18</sup>

The House of Representatives had inquired into the expediency of establishing federal penitentiaries as early as 1825. With the establishment of the Department of Justice, the Attorneys General constantly reminded Congress of the need for federal prisons. "When," reported Attorney General Akerman, "the number of United States prisoners was small, and transportation was difficult and expensive, it was convenient to use the penitentiaries of the States, but now, with our great increase of population and of crime, with the modern facilities for transportation, a few penitentiaries owned by the Government in different parts of the country, controlled and visited by officers of the United States, would answer all the ends of security and punishment, with a uniformity of superintendence and supervision which is desirable, but, under the present system, impossible." There was also need for penitentiaries in the District of Columbia and the territories, and for jails in certain localities.<sup>19</sup>

Toward the end of the century, the agitation over the contract system of prison labor began to affect the designation of prisons for federal convicts. In 1887 Congress for the first time interfered with the local discipline in an act forbidding the contracting of the labor of United States prisoners. Many contracts for the keep of federal

<sup>18</sup> Letters to Black and Buchanan, Dec. 16, 1859, April 6, 1860, Aug. 3, 1860, D. J. Mss.; Ann. Reps. Atty. Gen. 1870, 3; 1871, 8.

<sup>19</sup> Register of Debates, I, 151-152; Ann. Reps. Atty. Gen. 1870, 3; 1871, 8; 1884, 38; 1885, 35; 1886, 12; 1887, 10. *Dist. of Col., territories, and localities: Id.*, 1872, 13; 1874, 17; 1876, 7; 1881, 15; 1884, 34, 37; 1886, 15; 1890, 12.

convicts could not be renewed, and some states refused to receive United States prisoners under any terms.<sup>17</sup>

In 1891 Congress authorized the construction of three federal prisons, but failed to make any appropriation for the purchase of sites or the erection of buildings. In the next five years new objections to the old system appeared. The state systems of discipline were diverse and the credits for good behavior unequal. There was an incongruity in the practice whereby persons convicted of offenses unknown to the states were turned over to the states for punishment or reformation. Federal penitentiaries, argued the Attorneys General, would be a very great saving at least, and the prisoners might become actually self-supporting.<sup>18</sup>

At the same time they pointed to the federal jail built in 1890 on the military reservation at Fort Smith, Arkansas. Here convicts, witnesses, and those accused of crime but presumed innocent and awaiting trial, reported Attorney General Garland, "are confined in what is commonly dignified by the title of the 'United States jail,' but which is in reality little better than a pen, in which white, Indian, and negro prisoners are indiscriminately huddled." Six years later the local district judge and grand jury called attention to the further fact that women prisoners were kept there "only separated from the male prisoners by the iron grating, thereby allowing free and unrestricted conversation between them."<sup>19</sup>

For twenty years or more the Attorneys General had called these distressing conditions to the attention of Congress. Finally, in 1895, the military prison at Fort Leavenworth was transferred to the Department of Justice under a license from the War Department. Three-story dormitories had been converted into a prison by placing a row of steel cages on each floor. An army officer was detailed to act as temporary warden and promptly recommended building new and strong cell houses and cells. The civilian warden vigorously carried on the suggested building program, and for twenty years the

<sup>17</sup> *Id.*, 1886, 12; 24 Stat. 411, Feb. 23, 1887; Instr. Bk. W, 238; Ann. Reps. Atty. Gen. 1887, 10; 1888, 10; 1890, 10; 1891, 11; 1896, 28.

<sup>18</sup> *Id.*, 1891, 10; 26 Stat. 839, Mar. 3, 1891; Miller to Hoar, Feb. 12, 1891, Ex. and Cong. Letter Bk. No. 5, 79; Ann. Reps. Atty. Gen. 1892, 9; 1893, 11; 1894, 12; 1895, 25; 1896, 29.

<sup>19</sup> *Id.*, 1883, 17; 1885, 30; 1891, 15; 26 Stat. 41, April 4, 1890.

prisoners toiled building a new prison on the military reservation.<sup>10</sup>

Pressing need, however, could not wait while the prison at Leavenworth was pulling itself up by the bootstraps. In 1898 the federal jail at Fort Smith, Arkansas, was designated as a prison for the Indian Territory and part of Arkansas. In 1899 the construction of a penitentiary at Atlanta, Georgia, in accordance with the plan of the Act of 1891 was authorized; and a few years later, after the State of Washington had refused to accept the territorial prison at McNeil Island, that dilapidated institution became a federal penitentiary.<sup>11</sup>

These few institutions, from time to time improved and expanded, were the basis of a new system and opened a third phase of federal penal history. More than a century had elapsed since the states had begun a desultory struggle to solve their prison problems; and the federal government was still faced with the same troubles of safe-keeping, discipline, physical and mental care, and reformation in this field of perennial public neglect.

In the days of scattered territorial and local prisons insecure custody of convicts was a constant source of trouble, accentuated by lack of funds and the dispersion of responsibility among a multitude of local officers. There was no effective remedy where a prisoner escaped or even where he murdered a guard in doing so, and protective legislation in this respect did not come for more than sixty years after the creation of the Department of Justice.<sup>12</sup>

Matters of discipline and reward began to receive attention. The warden at Leavenworth allowed the growth of a mustache for good conduct. The investigators of the Department of Justice thought it

<sup>10</sup> 28 Stat. 957, Mar. 2, 1895; Ann. Reps. Atty. Gen. 1895, 28; 1897, 20; Gen. Agent to Atty. Gen., May 17, 1895, D. J. File 2256-1891; Sec. War to Atty. Gen., June 7, 1895, *ibid.*; Warden to Atty. Gen., June 15, 1895, *ibid.*; Ann. Rep. Atty. Gen. 1915, 13-14.

<sup>11</sup> *Fort Smith*: 30 Stat. 417, May 17, 1898; Ann. Reps. Atty. Gen. 1895, 5; 1896, 5-6. *Atlanta*: 30 Stat. 1113, Mar. 3, 1899; 31 Stat. 1184, Mar. 3, 1901; Ann. Rep. Atty. Gen. 1898, 26. *McNeil Island*: 35 Stat. 374, May 27, 1908; Ann. Rep. Atty. Gen. 1902, 18-22; Atty. Gen. to U. S. Marshal, April 13, 1876, Instr. Bk. F, 438. *Territorial prisons*: 14 Stat. 377, Jan. 22, 1867.

<sup>12</sup> *Custody*: Ann. Rep. Atty. Gen. 1930, 94; Instr. Bk. U, 293; Ex. and Cong. Letter Bk. A, 209; Instr. Bks. D, 155, 186, 371, 694; E, 33; F, 552. *Escapes*: Atty. Gen. to Dist. Atty., Nov. 13, 1885, Instr. Bk. T, 22; Warden of Leavenworth to Atty. Gen., Nov. 11, 1897, D. J. File 2256-1891; Ann. Rep. Atty. Gen. 1926, 5; and legislation, 1929-1936.

was surprising that Warden French's methods were satisfactory, "for we believe he has gone to the limit in trusting to the manliness and sense of decency and fair play of the men in custody." Seventeen years later, in 1912, Attorney General Wickersham introduced at Atlanta the experiment of permitting the prisoners to play baseball once a week.<sup>11</sup>

Since 1867 there had been a stream of legislation allowing a deduction in sentence as a reward for good behavior. In addition, a parole system, recommended in one form or another since 1883, was established in 1910 and subsequently much modified to provide for effective administration.<sup>12</sup>

In the 1880's it was difficult enough to see that local keepers properly fed and cared for their charges. Medical care was furnished by special arrangements in the territories and by reluctant prison contractors or by states and local governments. Sanitation was primitive. Called to account by the Attorney General on one occasion, a state prison warden replied that most of the federal prisoners he received were infected with skin disease, "besides they are generally very filthy and lousy, and some of them with scarcely sufficient clothes to cover their nakedness." When Leavenworth was made a federal prison, an army medical officer was detailed to furnish the necessary care for convicts and advice on sanitation. Not until 1930 was an arrangement made with the Public Health Service to take over the entire supervision and conduct of the medical and psychiatric work in the federal prisons.<sup>13</sup>

From the earliest days, any type of instruction or religious training met with a lack of both sympathy and funds. In the federal prisons, schools to instruct illiterate prisoners were finally established, but beyond that, reported the Attorney General as late as 1929, "overwhelmed with the task of housing and feeding twice as

<sup>11</sup> Warden of Leavenworth to Atty. Gen., Oct. 11, 1895, and Gen. Agent to Atty. Gen., July 18, 1898, D. J. File 2256-1891; Ann. Rep. Atty. Gen. 1912, 74.

<sup>12</sup> *Good behavior deductions*: Acting Atty. Gen. to Pres., Letter Bk. F, 447; Ann. Rep. Atty. Gen. 1901, 31. *Parole*: Ann. Reps. Atty. Gen. 1883, 17; 1885, 35; 1895, 31; 1896, 33; 1897, 27; 1898, 27; 1899, 46; 1906, 43; 1909, 28; 1911, 73; 89; 1912, 61; 1919, 4; 1920, 6; 1929, 75; 1932, 11, 119, 122.

<sup>13</sup> Instr. Bks. V, 357; No. 3, 520, 571. *Health and sanitation*: See letters from Warden, Ohio Penitentiary, July 29, 1895, from Marshal, Ft. Smith, Ark., Oct. 18, 1895, and from Commanding Officer, Ft. Leavenworth, June 8, 1895, D. J. File 2256-1891; Ann. Rep. Atty. Gen. 1930, 89; 46 Stat. 273, May 13, 1930.

many inmates as our penitentiaries should accommodate, the real work of our Federal prisons—i.e., personal reconstruction—has had to be deferred.”<sup>26</sup>

“So far as possible,” wrote the first civilian warden of Leavenworth, “we *must* have employment for these convicts. To lock them in their cells and keep them there would be to convert the Prison into a *hell* and an *insane asylum*.” The earliest American system of prison labor had evoked the protests of craftsmen, who objected to this form of competition. The result was that the prisons ceased to provide employment and hired out the convicts to contractors. The federal government did the same in the territories and, when federal prisoners were hired out in the states, the government insisted upon a reduction in the bill for keep.”<sup>27</sup>

Since 1882 successive Attorneys General had been confronted with the problem of finding work for federal prisoners, as the best system for both punishment and reformation. To remove the objections of free labor, they recommended that the prisons manufacture supplies only for government departments, a limitation which Congress soon attached to federal prison legislation. Many other legislative restrictions were laid upon prison labor, but at Leavenworth and Atlanta, until the time of the World War,<sup>28</sup> the convicts could be employed in building the prisons.

In 1918, when labor was scarce, Congress authorized the manufacture of cotton fabrics at Atlanta, such as mail sacks, for the government departments. Private industry, eager to supply the government, protested bitterly. Attorney General Stone reported to Congress that the most troublesome problem in the federal prison system was lack of employment and idleness the greatest evil, leading to deterioration “mentally, morally, and physically.” After some extension of

<sup>26</sup> Lewis, *op. cit.*, 10 *et seq.*, 18 *et seq.*; Ann. Reps. Atty. Gen. 1912, 74; 1929, 76; 1933, 109, 116.

<sup>27</sup> Warden to Atty. Gen., Jan. 29, 1896, D. J. File 2256-1891; Lewis, *op. cit.*, 41, 46 *et seq.*, 130 *et seq.*, 185 *et seq.*; and see *Convict Labor in the United States*, Rep. Bur. of Labor (1887), House Ex. Doc. 1, Pt. 5, 49 Cong. 2 Sess.; Instr. Bks. C, 690; D, 23, 82, 100, 603; F, 376; 24 Stat. 411, Feb. 23, 1887, and Ex. Orders, May 18, 1905, and Sept. 14, 1918.

<sup>28</sup> Ann. Reps. Atty. Gen. 1882, 15; 1885, 34; 1887, 12; 1895, 29; 1915, 13, 51; 1916, 22, 69; 1917, 13, 90; 1923, 76; 1924, 74; 1925, 53; 1929, 76; 1931, 105; see correspondence between Wickersham and Gregory, May 25 and June 17, 22, 1915, D. J. File 4-4-14, Sec. 1.



his authority in 1924, to establish a shoe, broom, and brush plant at Leavenworth, he undertook a survey of prison labor in the federal institutions in 1925. Economic depression beginning in 1929 moved the Department of Justice to curtail manufacture in the prisons. Government departments were reluctant to use prison labor, and the problem of managing prison industries became more and more trying. Finally, in 1930 and 1934, Congress authorized a diversification of prison manufactures to avoid complaints that prison labor was so concentrated on a few classes of articles as to discriminate against certain private industries.<sup>89</sup>

Proper security, care, and reformation obviously could not be expected without a segregation and classification of prisoners. A first step, urged by the Attorneys General, was the recognition that insane prisoners, long neglected, should be kept in special institutions. Even then Congress provided but one federal institution, and insane prisoners from Alaska had to be transported under guard to the federal hospital in the District of Columbia. Funds for transportation were often lacking; and when the term of imprisonment was ended, these unfortunates had to be turned out to shift for themselves. Nevertheless, a second institution for "defective delinquents" was not authorized until 1930.<sup>90</sup>

From the standpoint of numbers involved, there was even greater need for special institutions for youthful and first offenders. The Attorneys General struggled for twenty-five years to maintain a reform school for boys in the District of Columbia. Contracts were made with state schools, but the expense was great and the crowded state institutions were reluctant to receive federal wards. There were no institutions for girls. "Certainly," said Attorney General Miller, "their more tender natures and their greater susceptibility to influ-

<sup>89</sup> 40 Stat. 896, July 10, 1918; see numerous letters from and to textile industrialists, labor and commercial organizations, and Congressmen, 1918 to date, D. J. Files 416-0, Sec. 2 and 4-5-4-1, Sec. 3; Atty. Gen. to Sec. Labor, Feb. 12, 1925, D. J. File 4-5-4-1, Sec. 1; Ann. Reps. Atty. Gen. 1924, 74; 1931, 105, 106; 43 Stat. 6, Feb. 11, 1924; *Employment of Federal Prisoners*, Sen. Rep. 1, 68 Cong. 1 Sess. (1923). *Diversification of prison industry*: Ann. Reps. Atty. Gen. 1930, 90; 1935, 163; Ex. Order 7194, Sept. 26, 1935; 46 Stat. 391, May 27, 1930; 48 Stat. 1211, June 23, 1934.

<sup>90</sup> Lewis, *op. cit.*, 59 *et seq.*, 163 *et seq.*, 195 *et seq.*, 246 *et seq.*, 279 *et seq.*; Ann. Reps. Atty. Gen. 1870, 2; 1871, 8; 1879, 17; 1880, 20; 1881, 15; 1882, 15; 1883, 18; 1884, 36; 1885, 32; 1886, 11; Atty. Gen. to Marshal, Alaska, Jan. 24, 1889, Instr. Bk. No. 2, 479.

ences good and evil intensify in their behalf every argument which has been sufficient in establishing a school for boys." In 1892 Congress established a small reform school for girls in the District of Columbia.<sup>11</sup>

The plea for adequate federal reformatories was repeated for thirty years or more, until in 1925 and 1930 the construction of two was authorized, but the greater number of offenders under nineteen years of age were still kept in state institutions. There were no federal prisons for women. For a short while women prisoners were kept at Leavenworth, the warden's mother serving as matron without pay. After repeated recommendations, an industrial institution for women was authorized in 1924 and established at Alderson, West Virginia, but second offenders under the federal laws were still left to state institutions. Since 1929 a special annex for drug addicts has been maintained at Leavenworth, and in the same year the establishment of narcotic hospital farms, to be supervised by the United States Public Health Service, was authorized.<sup>12</sup>

This prison system, which had been so long building, was a great improvement, yet the federal penitentiaries remained crowded. Two prisoners were placed in each cell, others slept in basements. To meet these conditions, accentuated by the commitment of offenders under the prohibition laws, the establishment of prison camps was authorized in 1929, and another penitentiary in 1930 near Lewisburg, Pennsylvania. In 1933, another military prison, Alcatraz in San Francisco Harbor, was taken over and completely remodeled to provide maximum security in the confinement of intractable and dangerous prisoners.<sup>13</sup>

<sup>11</sup> Ann. Reps. Atty. Gen. 1872, 14; 1876, 11; 1877, 15; 1879, 18; 1880, 21; 1881, 16; 1882, 16; 1885, 31; 1886, 11; 1890, 13; 1891, 13; 1892, 12; 1893, 12; 1894, 15. *State schools: Id.*, 1886, 13; 1892, 12; 1911, 87. *Girls: Ann. Reps. Atty. Gen.* 1891, 13; 1892, 11; 1894, 14; 1895, 32; 1896, 33; 1897, 24; 1898, 28; 1899, 47; 1900, 41.

<sup>12</sup> *Id.*, 1887, 10; 1911, 89; 1922, 74; 1923, 76; 43 Stat. 724, Jan. 7, 1925; 46 Stat. 388, May 27, 1930. *Women: Letters of Warden*, May 15 and June 6, 1896, and Dec. 12, 1897, D. J. File 2256-1891; Ann. Reps. Atty. Gen. 1912, 78, 79; 1922, 74; 1923, 76; 43 Stat. 473, June 7, 1924. *Narcotic farms: 45 Stat.* 1085, Jan. 19, 1929.

<sup>13</sup> Ann. Reps. Atty. Gen. 1925, 53, 65; 1929, 74; 1933, 107; 1934, 139. *Prison camps: 45 Stat.* 1318, Feb. 26, 1929; Ann. Reps. Atty. Gen. 1930, 1; 1931, 112. *Lewisburg and Alcatraz: 46 Stat.* 388, May 27, 1930; 46 Stat. 325, May 14, 1930; Ann. Rep. Atty. Gen. 1934, 139, 155; Patman, *Alcatraz Penitentiary* (1936), Cong. Rec. LXXX, 4758-4761.

There was need for an administrative organization to care for the new widespread system of federal institutions. Attorney General Garland in the '80's had spent a great part of his time managing the federal penal system through the local authorities and local federal officers. After the first federal penitentiaries were erected, a Superintendent of Prisons was appointed in the Department of Justice. But the greater part of prison administration was carried on by the several wardens. Men of firmness, understanding, and integrity were sought for these positions. A prison bureau had been recommended as far back as 1889, but not established until more than forty years thereafter. There was pressing need for prison statistics. Indeed, as late as 1929 the Department of Justice did not know how many federal prisoners were held in county jails.\*\*

Moreover, while legislation had provided the basis for the confinement of convicted, long-term offenders, witnesses as well as those awaiting trial and those sentenced to short terms of imprisonment were still kept in state and county jails. For sixty years federal jails in the more populous centers were urged. "The average county jail," said Attorney General Garland in 1885, "is a poor place for the confinement of any one." Many of these jails, said Attorney General Wickersham twenty-five years later, "are wholly unsuitable for the detention of any human beings, and are shocking breeding places of crime."\*\*

For more than a century the Presidents, the Attorneys General, the judges, and individual legislators had reminded Congress of the "shocking" and "really outrageous conditions" in the jail in the District of Columbia, and the need for proper supervision and maintenance. Jails were needed in the territories, but even when built

\*\* Atty. Gen. to Marshal, Wash. Terr., April 13, 1876, Instr. Bk. F, 438; Marshal to Atty. Gen., Oct. 28, 1873, Colo., D. J. Ms.; Atty. Gen. to Marshal, Ark., Mar. 28, 1889, Instr. Bk. No. 3, 158; Warden of Leavenworth to Atty. Gen., June 15, 1895 and Mar. 21, 1896, D. J. File 2256-1891. *Prison bureau*: Ann. Reps. Atty. Gen. 1873, 4; 1889, 11; 1890, 11; 1910, 77; 1920, 4; 1929, 74, 75; 1930, 1, 85, 88; 1932, 121; 46 Stat. 325, May 14, 1930. Sanford Bates, a close friend and former associate of President Coolidge, was appointed Superintendent of Prisons in 1929. Upon the creation of the Bureau of Prisons, he was appointed director in 1930 and was reappointed by Attorney General Cummings in 1933.

\*\* Ann. Reps. Atty. Gen. 1885, 35; 1911, 89; and see 1870, 3; 1871, 8; 1890, 12; 1912, 61. See also Jefferson to Congress, March 29, 1802, and Jan. 24, 1803, Richardson, *op. cit.*, I, 338, 355; Register of Debates, II, Pt. 1, 1479-1480; Cong. Globe, LVII, Pt. 1, 816-817 (1862); Ringgold to Wirt, A. G. Ms.

were poorly maintained. It was not until 1929 that the utter lack of local facilities forced the acquisition of a few federal jails within the confines of the states—one hundred and forty years after the First Congress had called upon the states to care for federal prisoners.\*\*

\*\* *Federal jails*: Ann. Reps. Atty. Gen. 1929, 77; 1931, 108; 46 Stat. 325, Sec. 4, May 14, 1930; Public 599, 74 Cong., May 15, 1936; Cummings to Federal Emergency Administration of Public Works, July 13, 1936, D. J. File, 4-4-55-4-11.

## CHAPTER XVIII

### INVESTIGATION AND DETECTION

THE Department of Justice, according to a popular impression, is a bureau at Washington from which radiate all activities of the federal secret service. It creates, as a lawyer wrote in 1925, "visions of false whiskers, handcuffs, dictographs, and other devices."<sup>1</sup> On the other hand, there are those who feel that there is no justification for the existence of federal police or a national detective force. The facts, reaching far back into American history, belie both conceptions. There have been federal police in one form or another for a hundred years; but investigation, as a function of the Department of Justice, was not fully recognized until the opening years of the twentieth century. To this day by far the greater number of "secret service" agents are attached to the Treasury, the Post Office, and the Interior Departments. Technically, of course, there are no secret service agents except in one unit of the Treasury Department.

The ancient and inherited mode of Anglo-American law enforcement looked not to permanent officers but to the "grand jury" of local citizens who of old, sitting in secret session so that culprits might not be forewarned and escape, reported the scandal of the countryside for the consideration of the justices of England. In the populated country of today, it is of course impossible for the grand jury to report from its own knowledge violations and violators of the laws. Indeed, even in the earliest days of the United States informers were rewarded by a division of fines and recoveries.<sup>2</sup>

<sup>1</sup> Buckley, *The Department of Justice—Its Origin, Development and Present Day Organization*, 5 B. U. L. Rev. 177 (1925).

<sup>2</sup> Holdsworth, *History of English Law* (1903), I, 147-148. See: Edwards, *The Grand Jury* (1906), 34-35; *The Grand Jury*, 21 Col. L. Rev. 376 (1921); National Commission on Law Observance and Enforcement, *Report on Prosecution* (1931), 34; Stephen, *Criminal Law of England* (1883), I, 64-67, 185 *et seq.* Informers: 1 Stat. 43, 45, 48, July 31, 1789; Chief Clerk to Harwood, Aug. 11, 1869, Letter Bk. H, 24; Hoar to Sec. Treas., July 9, 1869, Letter Bk. G, 394; Ashton to Dist. Atty., Nov. 3, 1866, Letter Bk. F, 206.

Prosecuting attorneys in the states and the district attorneys of the United States also came to be regarded as responsible for the detection of offenses against both civil and criminal law and for the collection of evidence to support proceedings in the courts—duties very seldom specified in the statutes. They came to exercise the functions of an "investigator" concurrently with the sheriff or police, as well as the function of a "magistrate" in determining who should be brought to trial, the function of a "solicitor" in preparing cases for trial, and that of an "advocate" in trying them and in arguing appeals. "This uniting of a general responsibility for enforcement of law and duty of criminal investigation with the function of carrying on prosecutions," reported the National Commission on Law Enforcement in 1931, "was appropriate enough in a simple colonial society of the eighteenth century."<sup>3</sup>

With the formal creation of a Department of Justice in 1870, the Attorneys General called upon the district attorneys to follow upon the heels of rumor, to investigate, and to reach the truth of complaints. "Without publicity and strictly for the use of this Department, carefully inquire and reduce to writing such specific facts as you now know can be well substantiated by legal proof," cautiously reads an early letter of instructions. When private parties demanded relief, they were requested to put the district attorney upon the track.<sup>4</sup> Thus a century after the simpler colonial days the district attorneys still filled the rôle of detective and village constable.

The United States marshals in each judicial district, too, first created to execute judicial and executive orders, were soon given the powers of local sheriffs. They, through their powers to appoint deputies and to summon the able-bodied men of the community to their aid as a *posse comitatus*, prevented serious breaches of the peace in open and organized form. In cases of importance they were also expected to spare no effort to detect and apprehend violators of the law. When reports reached Washington that local lawlessness

<sup>3</sup> Natl. Commission on Law Observance and Enforcement, *op. cit.*, 12, 16.

<sup>4</sup> Ann. Rep. Atty. Gen. 1878, 18; Instr. Bks. I, 43; O, 104; R, 173; V, 67; W, 207.

went unchecked, the marshals were called upon to explain and were reminded that their failure to act was a reflection upon the Department of Justice.\*

With appalling frequency, these officers met violence and death—or "assassination," as Attorney General Miller more elegantly put it in 1890. "The number of deputy marshals killed in the Indian Territory averages twenty a year," said he. "Last week in an attempt to arrest seven notorious murderers and professional robbers," reported a district attorney, "three of your deputies and a number of citizens were killed in the fight."†

The grand jury for the western district of Arkansas in a remarkably penetrating document complained that a deputy marshal received no more for the arrest of a criminal at his beck or call "than he does for the worst desperado whom he has to follow for months and who can only be captured after a hard fight, in which the deputy is assisted by half a dozen other deputies, none of whom can charge anything for their services." They might travel for weeks, following trails and pointers, but if they came back without making an arrest they were out all expenses and time. Should the fugitive from justice be killed resisting arrest, then not only did the deputy not receive the one dollar fee but was required to bury the deceased at his own expense! If the deputy were killed or crippled in the service of the United States, the government paid no attention to him or his family. In eighteen years in that federal district, twenty-two deputies and thirty-five guards and posse, in all fifty-seven persons, were killed "and perhaps twelve times the number crippled."‡

Moreover, the duties of district attorneys and marshals not infrequently brought them into conflict with the prejudices and passions of whole communities. There was no federal penalty for the desperado who killed a federal officer engaged in executing the laws. For sixty years or more the Attorneys General recommended protec-

\* 1 Stat. 424, Sec. 9, Feb. 28, 1795; 12 Stat. 281, Sec. 7, July 29, 1861; and many statutes relating to particular subjects, as, for example, 18 Stat. 335, Sec. 3, Mar. 1, 1875; Marphree, *Sheriffs* (1884), 9-10, 642-647; Karraker, *The Seventeenth-century Sheriff* (1930). *Posse comitatus*: See *infra*, Ch. XXIV; Instr. Bks. G, 764; M, 275, 289; No. 62, 76.

† Ann. Reps. Atty. Gen. 1890, 13-14; 1893, 20-21.

‡ *Id.*, 1894, 20-22.

tive legislation. Frequently, state and county officers would prosecute in the local state courts federal officers who, in defending themselves, killed or injured their assailants.<sup>9</sup>

As the population increased, the detection of both offenses and offenders became increasingly difficult. To the requests of local federal officers for authority to employ detectives, the officers of the Department of Justice at Washington replied, "There is no precedent for such a course." Indeed, Acting Attorney General Phillips in 1881 found no statutes requiring the marshals themselves to perform "the service of detectives." Moreover, Congress required of them miscellaneous administrative duties, such as taking the census, disbursing funds for the local federal courts and officers, and caring for prisoners, in addition to their normal functions of attendance upon the courts and execution of judicial orders.<sup>10</sup>

Nevertheless, aside from occasional services of district attorneys and marshals, there was at first nothing like a general police or detective force in the federal government, or for that matter in the states. Indeed, even in England before 1856 there was no provision for paid policemen.<sup>11</sup> However, the specialized departments of the federal government—concerned with such matters as revenue, the mails, and the public lands—very early began to accumulate a force of "collectors," "inspectors," or "agents" for the investigation and detection of facts and offenses in their several fields of administration.

In the course of time these groups of officers became formally established in their several departments and agencies, such as the Visa Division and agents of the Department of State;<sup>12</sup> the Secret Service

<sup>9</sup> Atty. Gen. to Commr. Int. Rev., Mar. 13, 1882, Ex. and Cong. Letter Bk. K, 289; Ann. Reps. Atty. Gen. 1874, 21; 1877, 19; 1878, 18; 1879, 16; 1880, 16; 1881, 14; 1882, 14; 1883, 16; 1884, 14; 1885, 14; 1886, 11; 1890, 13; 1891, 20; 1892, 18; 1904, 11; 1910, 84; 1912, 63; 1914, 6; 1915, 10; 1916, 10; 1917, 10; 1918, 9; 1919, 2; 1920, 2; 1921, 1; 1922, 1; 1923, 1; 1924, 2; 1925, 4; 1926, 2; 1927, 3; 48 Stat. 780, May 18, 1934; Public 431, 74 Cong. 2 Sess., Feb. 8, 1936. *Prosecution of federal officers by state authorities*: Ann. Reps. Atty. Gen. 1878, 19; 1889, 14; 1908, 13; 1910, 84; 1912, 63; 1922, 3; 1923, 3; 1924, 4; 1925, 2; 1926, 1; 39 Stat. 532, Aug. 23, 1916; *In re Neagle*, 135 U. S. 1 (1890); *Gay v. Ruff*, 292 U. S. 25 (1934).

<sup>10</sup> Instr. Bks. L, 252, and X, 488.

<sup>11</sup> Maitland, *Justice and Police* (1885), 105 *et seq.*

<sup>12</sup> See State Dept., *The Immigration Work* (1935), 5; State Dept., *Department of State* (1922), 35 and (1933), 16.



(counterfeiting, protection of the President),<sup>12</sup> the Bureau of Customs,<sup>13</sup> the Bureau of Narcotics,<sup>14</sup> the Alcohol Tax Unit,<sup>15</sup> and the Intelligence Unit of the Bureau of Internal Revenue (income tax evasion)<sup>16</sup> in the Treasury; <sup>17</sup> the inspectors of the Post Office; <sup>18</sup> the Division of Investigations in the Department of the Interior (lands, public works, conservation); <sup>19</sup> the Immigration and Naturalization Service in the Department of Labor; <sup>20</sup> the Bureau of Navigation and Steamboat Inspection in the Department of Commerce; <sup>21</sup> the Legal Investigating Division of the Federal Trade Commission; <sup>22</sup> the Bureau of Inquiry of the Interstate Commerce Commission; <sup>23</sup> the Division of Field Operations of the Federal Communications Commission; <sup>24</sup> the regional offices of the Securities and Exchange Commission; <sup>25</sup> the field examiners of the Veterans Administration; <sup>26</sup>

<sup>12</sup> 12 Stat. 83 and 102, June 22 and 23, 1860; 12 Stat. 726 and 749, Mar. 3, 1863; 13 Stat. 351, Sec. 3, July 2, 1864; 22 Stat. 230, Aug. 5, 1882; Cong. Rec. XLIII, Pt. 3, 2181-2182; Treasury Dept., *Fines and Imprisonments in Counterfeiting Cases* (1935), 5; Keyes, *Tales of the Secret Service* (1927); Burnham, *Memoirs of Secret Service* (1872); Whitley, *In It* (1894); Wilkie, *American Secret Service Agent* (1934).

<sup>13</sup> Ann. Rep. Sec. Treas. 1935, 102; Schmeckebier, *The Customs Service* (1924), 28, 95, 119; 16 Stat. 122, May 12, 1870.

<sup>14</sup> Ann. Rep. Sec. Treas. 1935, 138.

<sup>15</sup> *Id.*, 124; Ann. Rep. Commr. Int. Rev. 1935, 28; *Internal Revenue Manual* (1888), 56.

<sup>16</sup> Ann. Rep. Sec. Treas. 1935, 132; Ann. Rep. Commr. Int. Rev. 1935, 42; Schmeckebier and Eble, *The Bureau of Internal Revenue* (1923), 13, 133, 145.

<sup>17</sup> Shaw, *Administrative Control of Field Services in U. S. Treasury* (1933).

<sup>18</sup> *Final Report of the Joint Commission on Postal Salaries*, Sen. Doc. 422, 66 Cong. 3 Sess. (1921), 120 *et seq.*; Cushing, *Story of Our Post Office* (1898), 310; Kelly, *United States Postal Policy* (1931), 142; Holbrook, *Ten Years Among the Mail Bags* (1856), 25; Woodward, *Guarding the Mails* (1881); Woodward, *The Secret Service of the Post Office Department* (1886); Ann. Rep. P. M. G. 1935, 69; 5 Stat. 80, Sec. 2, July 2, 1836; 5 Stat. 171, Mar. 3, 1837.

<sup>19</sup> *The Secret Service of the Department of the Interior*, Sen. Doc. 728, 62 Cong. 2 Sess. (1912); 33 Stat. 1184, Mar. 3, 1905; Ann. Rep. Sec. Int. 1935, 7.

<sup>20</sup> Ann. Rep. Sec. Labor 1935, 82; Smith and Herring, *The Bureau of Immigration* (1924), 87; *Enforcement of Chinese Exclusion Laws* (1906), House Doc. 847, 59 Cong. 1 Sess.; Cavanaugh, *Immigration Restriction at Work Today* (1928), 27.

<sup>21</sup> Ann. Rep. Sec. Comm. 1935, xxii, 156; Short, *Steamboat Inspection Service* (1922), 60; Short, *The Bureau of Navigation* (1923), 62, 82.

<sup>22</sup> Ann. Rep. F. T. C. 1935, 5, 9, 46; Harlan and McCandless, *The Federal Trade Commission* (1916), 79.

<sup>23</sup> Ann. Rep. I. C. C. 1935, 50; Sharfman, *op. cit.*, Pt. III-A, 80; Aitchison, *Organization of Interstate Commerce Commission* (1929), Sen. Doc. 8, 71 Cong. 1 Sess.; Davis, *Interstate Commerce Commission* (1910), 8.

<sup>24</sup> Ann. Rep. F. C. C. 1935, 15, 59, 68.

<sup>25</sup> Ann. Rep. S. E. C. 1935, 14, 30.

<sup>26</sup> Ann. Rep. Admr. Vet. Affairs 1935, 33; Ex. Order 6166, June 10, 1933; Weber and Schmeckebier, *The Veterans Administration* (1934), 317.

the bank examiners of the Federal Reserve Board;<sup>27</sup> and many others."<sup>28</sup>

The agents of each of these perform genuine detective functions, though some of them, such as those in the Treasury, Post Office, and Interior, more nearly fulfill the popular conception of police or detectives. They, too, perform hazardous duties. In a four-year period, for example, the Commissioner of Internal Revenue reported twenty-five employees killed and forty-nine wounded."<sup>29</sup>

This enumeration does not exhaust the list. Indeed, it is difficult to conceive of any public administrative work which does not require some form of investigation, and it must be apparent that field investigation is a large and vital part of the duties of government."<sup>30</sup> Information is the first requisite to the effective execution of laws.

Yet these agencies were limited to special subjects of investigation in the enforcement of particular laws, and to them the Attorneys General from the earliest days could refer only complaints within special fields. The greater part of the laws, indeed the more common and in many ways fundamental statutes, was the responsibility of no specially designated agency of the federal government except as the Department of Justice or its law officers might be implied or specifically named. Nevertheless, the Attorneys General had ruled that the funds for expenses of the United States courts and local federal officers could not be employed to pay detectives."<sup>31</sup>

Immediately upon the organization of the Department of Justice in 1870 the Senate Committee on Appropriations became interested in the need for funds to be used in discovering offenses against the laws of the United States, particularly violations of the reconstruction acts and election laws. Attorney General Akerman, when asked for

<sup>27</sup> Ann. Rep. Fed. Res. Bd. 1934, 54.

<sup>28</sup> In addition there are more specialized or scientific agencies, such as the Military Intelligence Division of the War Department and the Intelligence Division of the Navy Department as well as the investigative field forces in the Public Health Service (quarantine), the several services of the Department of Agriculture (food and drugs, dairies, forests), the Engineering Division of the Federal Power Commission, and the analysts and investigators of the United States Tariff Commission.

<sup>29</sup> Atty. Gen. to White, Sept. 25, 1880, Letter Bk. N, 203.

<sup>30</sup> See Report of House Committee, Cong. Rec., XLIII, Pt. 3, 2181-2189; Pt. 4, 3795-3801.

<sup>31</sup> Cushing to Morse, April 14, 1855, A. G. Ms.; Binkley to Dean, May 20, 1868, Letter Bk. G, 158; Coffey to Ball, Sept. 2, 1861, Letter Bk. B-4, 127; Sec. Int. to First Comptroller, June 21, 1862, Jud. Letter Bk. 7, Depr. Int., 461.

his views, disapproved of appropriations of so "vague" a character. "But the reasons in favor of this proposition are strong," he admitted. "It is intended to employ persons who shall exert themselves to detect and prosecute a class of offences which now no officer is likely to feel specially charged with." The poor and the ignorant were the sufferers, said he. "The law would be better enforced if the Attorney General had authority to employ persons who would learn facts, gather testimony, and prefer charges against the offenders in such cases." \*\*

As a result there was made available in 1871 a fund of fifty thousand dollars to be expended by the Attorney General in the detection and prosecution of crimes against the United States. This appropriation, renewed in different sums annually since that time, was to become the basis of the centralized investigative function of the Department of Justice. In 1873 an additional fund was made available for detecting and punishing violations of the acts of Congress relating to Indians and frauds committed in the Indian service. In 1878 the fund for detection of crimes generally was also made available for the investigation of official acts, records, and accounts; and twenty years later it was made to include inspections of United States prisoners and prisons as well.\*\*

The sums first made available for work extending across a continent and involving the detection of offenses arising under the statutory accumulation of a century were small. The funds were needed for the inspection of the records, accounts, and activities of local federal law officers.\*\* Moreover, some of the chief law officers of the United States either disliked the idea of any national detective force or preferred to confine the activities of the Department of Justice to proceedings in the courts, leaving the investigation of facts and the apprehension of offenders to other departments or to interested private citizens.

\*\* Akerman to Cole, Jan. 23, 1871, Letter Bk. H, 586.

\*\* 16 Stat. 497, Mar. 3, 1871; 17 Stat. 512, Mar. 3, 1873; 20 Stat. 234, June 20, 1878; 30 Stat. 641, July 1, 1898. Authority to protect the person of the President and to make investigations regarding official matters under the control of the Department of Justice or the Department of State upon proper request was added in 1910 and 1916. 36 Stat. 748, June 25, 1910; 39 Stat. 311, July 1, 1916.

\*\* See Chs. XXIII, XXIV, *infra*.

Attorney General Akerman in 1871 called upon the secret service of the Treasury Department to employ "capable and trusty persons" to operate in the South and unearth violations of the enforcement acts. In other sections, including the far West, district attorneys were given lump sums to expend on investigations. In 1875 Attorney General Williams appointed a "special detective" for the New England states, another for the Middle Atlantic states, another for the Middle West, and a fourth for the South. Thereafter, a few "agents" or "special agents" were employed and sometimes designated as "general deputy marshals." The department stoutly maintained that it had no detective force but simply employed agents from time to time as needed and designated by the district attorneys."

"I have always been adverse to appointing and paying detectives," wrote Attorney General Brewster nine years later, "and I promptly disposed of them and dismissed them." Yet he found it advisable to employ the Pinkerton Detective Agency, until Congress prohibited the practice in 1892. Thereafter with increasing frequency the Department of Justice quietly obtained the assistance of customhouse inspectors, agents of the Interior, bank examiners, and particularly the secret service operatives of the Treasury."

In 1878 Attorney General Devens had reminded Congress that the Department of Justice was without means of investigating infractions of the laws. His successors faced the same condition. "While it is quite easy to detect and prove combinations of workmen because of their large numbers and the methods which they necessarily adopt," said Attorney General Harmon eighteen years later in speaking of antitrust investigations, "time, care and skill are required to obtain legal proof of combinations and conspiracies among producers and dealers, who are few in number and able to resort to skillful and secret methods." He preferred, however, to confine the

\*\* Akerman to Whitley, June 28, 1871, Letter Bk. H, 777; Ex. and Cong. Letter Bk. B, 72; Letter Bks. K, 29; M, 231; Instr. Bks. E, 389-391; G, 111, 112; M, 231, 234, 348; No. 39, 163; Ex. and Cong. Letter Bks. H, 25; I, 677.

\*\* Brewster to Woodward, Sept. 4, 1884, Letter Bk. Q, 193; 27 Stat. 368 and 391, Aug. 5, 1892 and Mar. 3, 1893; Ex. and Cong. Letter Bk. L, 363; Instr. Bk. P, 199, 287; agents borrowed from other departments, Instr. Bk. P, 219, 229, 230, 383, and Dept. Circular 25, to dist. attys., May 15, 1908.

Department of Justice to court work and believed that detective duties should be committed to some other department."

At the turn of the century a movement arose for the establishment of a federal bureau of criminal identification and information in the Department of Justice, but, although long recommended by other Attorneys General and already undertaken on a modest scale in the new federal penitentiaries, Attorney General Griggs and his successor Knox were not sympathetic because it would be more useful to the states than to the federal government. Nevertheless, in 1907 with the recommendation of a new Attorney General, Bonaparte, Congress provided funds for the collection, classification, and preservation of criminal identification records and their exchange with state officials. It was nearly thirty years before this service was to become fully effective—and successful beyond the dreams of its first proponents."

The 1900's found the facilities of the department limited to cases of great public frauds amounting to scandal, antitrust prosecutions, or other cases where public sentiment or other pressure forced the assignment of a few agents. The average citizen was left to local help or his own resources. "You should furnish me with the names of the parties holding your daughter in bondage, the particular place, and the names of witnesses by whom the facts can be proved," replied Acting Attorney General McReynolds in 1903 to a plea to locate a kidnapped girl."

Even where public and industrial interest was sharply focused—cases of monopoly and railroad rate discriminations—the small, unorganized forces of the Department of Justice were utterly insufficient. "Men have shrunk from betraying their confederates," reported Attorney General Moody. "The cases, therefore, in which evidence has been or will be obtained are occasional and exceptional."

<sup>17</sup> Ann. Reps. Atty. Gen. 1878, 18, 20; 1889, 20 and Exhibits 3-5; 1896, Exhibit 1.

<sup>18</sup> Ann. Reps. Attys. Gen. 1889, 11-12; 1890, 11. *Knox and Griggs*: Misc. Letter Bks. No. 45, 178; No. 49, 102; No. 54, 215, 216; No. 55, 444; Ex. and Cong. Letter Bks. No. 45, 394; No. 55, 368. *Bonaparte*: 34 Stat. 1358, Mar. 4, 1907; Ann. Rep. Atty. Gen. 1906, 44; Rep. of Am. Bar Assn. (1906), XXIX, Pt. 1, 32, 596. *Subsequent history*: Ann. Reps. Atty. Gen. 1907, 44; 1908, 50; 1919, 107; 1925, 122; 1929, 1, 68; 1930, 80 (and 46 Stat. 554, June 11, 1930); 1931, 92; 1932, 106; 1933, 100; 1935, 136; U. S. C., Tit. 5, Sec. 300.

<sup>19</sup> Nov. 21, 1903, Misc. Letter Bks. No. 116, 298 and No. 59, 394.

Either evil must be allowed to continue with now and then the punishment of a detected crime, said he, or some remedy "deeper than any law now upon the statute book" must be found.<sup>40</sup> It is to be noted, however, that Congress had supplied funds and the Department of Justice Act of 1870 had empowered the Attorneys General to develop whatever organization might be needed.

Since 1878 there had been employed in the Department of Justice a handful of "examiners" whose duty it was to investigate the records and accounts of clerks of court, marshals, commissioners, and district attorneys. Appointments to this force came to be regarded as patronage, and at the opening of the century the examiners were without more than nominal supervision and rendered only desultory service. They and a special agent for Indian matters worked under the direction of a "General Agent" who soon became a budget and accounting officer.<sup>41</sup>

In 1905 a beginning was made in reorganizing the examiners under the supervision of the General Agent; and their investigations were to include, in addition to the check of clerks' and marshals' records, matters from the various divisions of the department or from other sources and special investigations in particularly difficult or important cases. The thirty-two borrowed operatives from the secret service of the Treasury were brought under more direct supervision of the United States attorneys or officers of the Department of Justice for whom they were making investigations. They were appointed special agents under the supervision of the General Agent but reported daily to the Chief Examiner.<sup>42</sup> The organization was crude, but here were the origins of a new national investigative force.

The House Committee on Appropriations now began to exhibit a lively and, as subsequently appeared, disapproving interest in the federal "secret service," as all investigating activities were then known. In 1906, 1907, and 1908 the chairman called for a complete

<sup>40</sup> Ann. Rep. Atty. Gen. 1905, 16.

<sup>41</sup> Easby-Smith, *The Department of Justice* (1904), 33; *Report of the General Agent* (1884).

<sup>42</sup> Memoranda by Finch, one undated, another approved by Sol. Gen. Hoyt, Aug. 17, 1905, Finch Mss.; and Memoranda, Mar. 21, 1907, Mar. 22, 1907, April 4, 1907, April 15, 1907, Order of Atty. Gen., April 17, 1907, D. J. File 44-3-11-3-1; Memorandum for Atty. Gen., Sept. 30, 1907, Finch Ms.; Letters of Atty. Gen., July 7 and 9, 1908, D. J. File 44-3-11-3-2.

list of all "inspectors" and special agents employed by the Department of Justice since 1896. The replies disclosed eight examiners and one special agent in 1896, and in 1906 eight examiners and twelve special agents, seven of whom were employed in antitrust investigations.<sup>44</sup>

The changes in the organization and work of the examiners and secret service operatives had been authorized by Attorney General Bonaparte. Grandson of the Emperor Napoleon's brother who had married Elizabeth Patterson of Baltimore, Charles Joseph Bonaparte was of large and sturdy build with a "vast, round, rugged head" and constant good humor. As a lawyer of wealth, passionately interested in good government and civil service reform, he came to know Civil Service Commissioner Theodore Roosevelt. When Roosevelt became President he sought and secured Bonaparte's services for the investigation of conditions in the Indian Territory, for the prosecution of postal frauds, for the Secretaryship of the Navy, and finally for the Attorney Generalship.<sup>45</sup>

Bonaparte promptly called the attention of Congress to the anomaly that the Department of Justice had no permanent detective force under its immediate control. "It seems obvious that the Department on which not only the President, but the courts of the United States must call first to secure the enforcement of the laws, ought to have the means of such enforcement subject to its own call," said he. "A Department of Justice with no force of permanent police in any form under its control is assuredly not fully equipped for its work."<sup>46</sup>

Congress responded by depriving the Department of Justice of the use of *any* secret service operatives borrowed from the Treasury! When the amendment had passed the House, District Attorney Stimson at New York, who was to be Secretary of War under President Taft and years later Secretary of State, felt that the "fighting power" of his office was destroyed. "The Secret Service detectives have recently been employed by the Department of Justice and the Depart-

<sup>44</sup> Atty. Gen. to Tawney, Feb. 23, 1906, Feb. 8, 1907, Jan. 21, 1908, D. J. File 44-3-11-3-1.

<sup>45</sup> Bishop, *Charles Joseph Bonaparte* (1922), particularly Ch. VI; Dict. Am. Biog., II, 427.

<sup>46</sup> Ann. Rep. Atty. Gen. 1907, 9-10.

ment of the Interior," said the *New York Times*, "and their investigations have borne fruit in the conviction of the late Senator MITCHELL, the indictment of two members of the House, and the restoration of more than a million acres of the public domain fraudulently obtained by a powerful 'ring' of land thieves." The Representatives have, it continued, "however unwittingly, become the tools of thieves." <sup>46</sup>

The President was characteristically vigorous in his annual message to Congress. "It is not too much to say that this amendment has been of benefit only, and could be of benefit only, to the criminal classes," he declared. "The chief argument in favor of the provision was that the Congressmen did not themselves wish to be investigated by Secret Service men. Very little of such investigation has been done in the past; but it is true that the work of the Secret Service agents was partly responsible for the indictment and conviction of a Senator and a Congressman for land frauds in Oregon. I do not believe," he continued caustically, "that it is in the public interest to protect criminals in any branch of the public service, and exactly as we have again and again during the past seven years prosecuted and convicted such criminals who were in the executive branch of the Government, so in my belief we should be given ample means to prosecute them if found in the legislative branch. But if this is not considered desirable a special exception could be made in the law prohibiting the use of the Secret Service force in investigating members of Congress." <sup>47</sup>

A legislative tempest ensued. In the House, the President's remarks were construed to lessen the dignity and usefulness of Congress, but it was deemed proper to give the President an opportunity to explain. He replied that he had intended no reference to the Congress as a whole but only to certain members of the House Committee on Appropriations, pointed out that an article written by the private secretary to the Speaker had initiated agitation against the secret service, recounted the investigative feats of the service, challenged the House not only to restore the law but to raise the salary of the

<sup>46</sup> 35 Stat. 328, May 27, 1908; Cong. Rec., XLII, Pt. 6, 5554-5560; Pt. 7, 6628, 6229, 6878, 6894; clipping from *New York Times* enclosed with Stimson to Bonaparte, May 6, 1908, D. J. File 44-3-11-3, Sec. 1.

<sup>47</sup> Cong. Rec., XLIII, Pt. 1, 24-25.



chief of the secret service as well, and recommended that the whole service be placed "where it properly belongs, and made a bureau in the Department of Justice."

The House called for information as to the uses of special agents by the Department of Justice, resolved that the annual message relating to the secret service was not respectful and that the explanatory message was unresponsive, and formally determined to ignore both. It also appointed a committee to investigate in detail the branches of the government engaged in the detection of frauds in the public service, and House committees continued to investigate the investigative agencies of the government.<sup>48</sup>

The Senate, where the limitation upon the use of the secret service had been accepted only at the insistence of the House, also investigated. The President's lengthy personal correspondence with Senator Hale of the Appropriations Committee disclosed some of the sordid confidential information upon which he had acted and the gross misrepresentations as to the size of the secret service. But the Senate found that the Department of Justice had not only authority but a force of its own which could be increased to meet future needs<sup>49</sup>—a conclusion which proved to be true.

The incident provided a source of gossip and discussion throughout the year 1909. The next year, and for three years thereafter, Congress provided the Department of Justice with a special fund for the investigation of frauds upon the United States.<sup>50</sup>

Appeals for some form of detective assistance poured in upon the Attorney General from the district attorneys. District Attorney Stimson wrote that the matter was of "transcending" importance. The secret service had been invaluable. It would be highly expedient if some of the men who had proved their fidelity and ability could be transferred to the Department of Justice. This would prevent

<sup>48</sup> *Id.*, XLIII, Pt. 1, 140, 373-375, 458-465, 615, 645-684, 699, 711, 755, 879, 920-924; Pt. 2, 1167-1168, 1391, 1685-1686; Pt. 4, 3121-3129, 3795-3801; and see XLV, Pt. 1, 294; see letters of Jan. 1, 7, 8, 13, 14, and Feb. 14, 1909, D. J. File 44-3-11-3, Sec. 3 and 44-3-11-3, Sec. 4.

<sup>49</sup> Cong. Rec. XLIII, Pt. 1, 303, 311-315; Pt. 3, 2181-2191; see letters of Dec. 19 and 31, 1908, Jan. 14 and Feb. 6, 14, and 17, 1909, D. J. File 44-3-11-3, Sec. 3 and 44-3-11-3, Sec. 4; Roosevelt to Hale, Jan. 5 and Feb. 19, 1909, Roosevelt Papers, Lib. Cong.

<sup>50</sup> 36 Stat. 213, 748, and 1424, Feb. 25 and June 25, 1910, and Mar. 4, 1911; 37 Stat. 464, Aug. 24, 1912.

politics and other personal considerations in the selection of a new force."<sup>1</sup>

Attorney General Bonaparte planned the organization of a separate investigative force to take the place of service borrowed from the Treasury. He sent Chief Examiner Finch to interview the district attorneys at New York and Chicago, and on July 26, 1908, directed that all requests for investigations be referred to the Chief Examiner. "It is my plan," he wrote, "to keep a record of the work of all the special agents under the Department in a single office, namely, that of the chief examiner, in order that all the records may be kept together and all the members of the force made available to the best advantage." <sup>2</sup>

For the President's personal information, he set forth the need of the new service in an exhaustive letter of January 14, 1909. "The difficulties encountered in recruiting a trustworthy and efficient detective force are serious," said he. Detectives were often tempted to manufacture evidence and a large proportion of those professing to be detectives in private employ were generally believed to be former law breakers. To counteract widespread popular prejudice, he proposed that the members of such a force should receive sufficient compensation to render the service attractive to intelligent and courageous men of good character and adequate education and they should be subject to an extremely strict discipline. Responsibility for such a force, he concluded, should rest upon an officer of high rank, a member of the cabinet and preferably the Attorney General, "so that, if any ground for reasonable complaint connected with the detective force shall be found to exist, he shall be the person justly to be called to account." <sup>3</sup>

Six weeks later Bonaparte left office with the departing Roosevelt administration. Nearly four decades had passed since Congress began

<sup>1</sup> Stimson to Bonaparte, June 5, 1908, D. J. File 44-3-11-3, Sec. 1; see also letters to and from dist. atty., Chicago, June 25, 1908, and July 7, 1908, *ibid.*; to dist. atty., Boston, July 6, 1908, and from dist. atty., Brooklyn, July 9, 1908, D. J. File 44-3-11-3, Sec. 2; to and from dist. atty., Boston, June 7 and 10, 1909, D. J. File 44-3-11-3, Sec. 4.

<sup>2</sup> Order and Letters of July 6, 8, 26, 27, 30, 1908, D. J. File 44-3-11-3, Sec. 2; Ann. Rep. Atty. Gen. 1908, 7; Gauss to Finch, Aug. 27, 1908, Bonaparte Papers, Lib. Cong.

<sup>3</sup> Bonaparte to Roosevelt, Jan. 14, 1909, D. J. File 44-3-11-3, Sec. 3.

appropriating funds for investigations. Twelve days after the inauguration of President Taft, Attorney General Wickersham formally created a "Bureau of Investigation" with the chief examiner as the chief of the new bureau, to take the place of the ten or twenty bank examiners previously supplied by the Comptroller of the Treasury, the twenty or less operatives borrowed from the secret service, the fifty naturalization examiners, the seven special agents employed in land fraud cases, and the twelve examiners of the Department of Justice. An investigative agency under the direction of the chief law officer of a great nation was something new in Anglo-American government."<sup>44</sup>

Wickersham believed that correct organization required that the secret service of the United States should be under the Department of Justice rather than under the Treasury Department "except in so far as the comparatively limited scope of work which is at present being carried on by the Treasury Secret Service is concerned." He carried on an extensive correspondence regarding the relation of agents of the Department of Justice to the investigative forces of other departments, particularly the Treasury, and laid down the rule that while the Justice agents might render assistance which required no expense and report to other departments any matters that happened to come to their attention they were not to concern themselves with investigations specifically assigned by law to other federal agencies."<sup>45</sup>

Thereafter the major problems of organization were largely confined to further adjustment of relations to other departments and their investigators,"<sup>46</sup> the delineation of the respective spheres of marshals and special agents,"<sup>47</sup> the field organization of the special agents and their relation to the district attorneys,"<sup>48</sup> reorganizations to meet

<sup>44</sup> Order, Mar. 16, 1909, D. J. File 44-3-11; Ann. Rep. Atty. Gen. 1909, 8; Howard, *op. cit.*, 46 *et seq.*, 198 *et seq.*, 396-397. Name of bureau: Ex. Order No. 6166, June 10, 1933; 48 Stat. 537, April 7, 1934; 49 Stat. 77, Mar. 22, 1935; Hearings, *Department of Justice Appropriation Bill for 1936* (1935), House Subcomm. on Approp., 74 Cong. 1 Sess., 16-17.

<sup>45</sup> Letters of Feb. 15, 20, Mar. 8, June 30, July 1, 1909, Jan. 8, 11, 12, 13, 14, 1910, D. J. File 44-3-11-3, Sec. 4; Ann. Rep. Atty. Gen. 1932, 107.

<sup>46</sup> Atty. Gen. to Sec. Int., Mar. 16, 1909, and to and from Bennet, Feb. 15 and 16, 1909, D. J. File 44-3-11-3, Sec. 4.

<sup>47</sup> Circulars 1242 and 1521, Nov. 16, 1921, June 11, 1924, D. J. File 44-3-11-3, Sec. 4.

<sup>48</sup> Stimson to Bonaparte, June 30, 1908, D. J. File 44-3-11-3, Sec. 2; Circular 1233, Oct. 19, 1921, D. J. File 44-3-0-2; and see D. J. File 44-3-11-3.

reduced appropriations," and the selection and training of personnel which included many accountants as well as other types of experts."

The special agents were purely investigative officers, exercising their function in aid of executive officers of the United States. Another quarter century was to pass before they were permitted to carry arms, serve warrants and subpoenas, or make seizures and arrests—powers recommended since 1910 and granted in 1934 to cope with the new criminal "gangster" or "racketeer." "

The federal agents, unlike the state and local police, were engaged in investigations in both the civil and the criminal fields. Attorney General Wickersham in 1910 listed as most important their work in connection with the national banking laws, antitrust laws, peonage laws, the bucket-shop law, the laws relating to fraudulent bankruptcies, the impersonation of government officials with intent to defraud, thefts and murders committed on government reservations, offenses against government property, and those committed by federal court officials and employees, Chinese smuggling, customs frauds, internal revenue frauds, post office frauds, violations of the neutrality laws, white slave cases, land frauds, and immigration and naturalization cases."

The new organization immediately caught the popular fancy. The *Boston Post* under the caption, "A KING DETECTIVE," melodramatically described the chief of the bureau as "direct as a stroke of lightning and as clear in his ideas as a mathematician while working out a problem. He has reduced shadowing and the other ancient arts of the detective to a minimum." "

From 1912 to 1914 a curious administrative development occurred in the transfer of the Chief of the Bureau of Investigation to the newly created office of Commissioner for the Suppression of the White Slave Traffic. For a while the bureau and its chief are said to

" Letter of director to officials of bureau, May 15, 1933, D. J. File 44-3-11; Ann. Rep. Atty. Gen. 1935, 142.

" *Id.*, 1908, 7; 1921, 128; 1926, 100; 1929, 68; 1930, 79; 1935, 134; Memorandum, Director to Atty. Gen., April 30, 1934, D. J. File 44-3-11-3, Sec. 5.

" 48 Stat. 1008, June 18, 1934; Ann. Reps. Atty. Gen. 1910, 76; 1912, 62; see Hearings, *Department of Justice Appropriation*, Sen. Subcomm. on Approp. (1936), 74 Cong. 2 Sess., 199-202.

" Ann. Rep. Atty. Gen. 1910, 25; 1911, 22; 1912, 46, 50; 1913, 44; 1914, 45, 47, 51; 1915, 47; 1919, 16; 1935, 139, 140.

" Sunday, July 3, 1910.

have been under the general supervision of the commissioner, who with a considerable staff throughout the country was vigorously engaged in stamping out involuntary, commercial prostitution, under the very active direction of Attorney General Wickersham. Upon the change of administration, Attorney General McReynolds abolished this special organization for the suppression of white slavery and Commissioner Finch, who had been Chief Examiner before becoming Chief of the Bureau of Investigation, left the Department of Justice."

The regular work of the bureau was soon interrupted by the World War, which brought with it new problems of law enforcement at a time when public feeling ran high." The close of the War was followed by a campaign to suppress radical activities. In 1921 Attorney General Daugherty made much over a "thorough reorganization" of the Bureau of Investigation. He selected William J. Burns, an elderly professional detective who appeared in the checked and colored frock coat of an earlier day and recruited a staff of private detectives. It was necessary to train these men for their new work, and the campaign to uproot radicalism, which had brought Palmer both praise and criticism, seemed centered upon labor organizations. To many this was a sordid period, echoes of which are still heard upon occasion."

Upon his appointment in 1924, Attorney General Stone immediately directed his attention to needed readjustment of the Bureau of Investigation. By the simple expedient of confining investigations exclusively to violations of statutes and by a reorganization of the personnel through elimination of the unfit and their replacement with

"Atty. Gen. to Finch, April 29 and June 14, 1912, April 9, Dec. 19, 1913, and Mar. 25 and 31, 1914, Finch Mss., D. J. Pers. Files and Appr. Bk. No. 24, 474; Ann. Reps. Atty. Gen. 1911, 25; 1912, 48; 1913, 50; 1914, 45; 1915, 43; 1916, 52; 1917, 79; 1918, 102; 1919, 75; *The Sacramento Bee*, Mar. 6, 1913; *The Light*, July 1912, 17-29; *The New York World*, May 31, 1914.

"Ann. Reps. Atty. Gen. 1917, 82; 1918, 15.

"Ann. Reps. Atty. Gen. 1919, 12; 1920, 167; 1921, 128; 1922, 67; 1923, 68; D. J. Files 202600; 186701; Senate Hearings, *Bolshevik Propaganda* (1919), Sen. Sub-comm. Jud., 65 Cong. 3 Sess.; *Investigations of Activities of Department of Justice* (1919), Sen. Doc. 153, 6 Cong. 1 Sess.; National Popular Government League, *Report Upon the Illegal Practices of the United States Department of Justice* (1920); Hearings, *Attorney General Palmer on Charges Against Department of Justice* (1920), House Comm. on Rules, 66 Cong. 2 Sess.; Hearings, *Charges of Illegal Practices of Department of Justice* (1921), Sen. Sub-comm. Jud., 66 Cong. 1 Sess.; Cong. Rec., LXIV, Pt. 3, 3004-3027 (1923); Cong. Rec., LXXX, 9336-9342, 9342-9344 (1936); Daugherty and Dixon, *The Inside Story of the Harding Tragedy* (1932), 105-106, 122 et seq.

agents of legal education or knowledge of accounting, reenforced by a system of rigid inspection and intensive special training, he laid the foundations for a new and efficient service."

"Stone to Frankfurter, Feb. 9, 1925, D. J. File 44-3-11, Sec. 1; and see D. J. File 202600; Ann. Reps. Atty. Gen. 1924, 60; 1925, 106; Memorandum, May 16, 1924, and Circular to Agents, May 27, 1924, D. J. File 44-3-11-3, Sec. 4. J. Edgar Hoover, a member of the staff of the Bureau of Investigation, was appointed director by Attorney General Stone in 1924. He was reappointed by Attorney General Cummings in 1933.

Harlan Fiske Stone (1872- ) was born at Chesterfield, New Hampshire, practiced law in New York, became a lecturer on law at Columbia University and then dean of the Columbia Law School, was appointed Attorney General by President Coolidge in 1924 and served until in 1925 he became an associate justice of the Supreme Court of the United States.

## CHAPTER XIX

### THE NATURAL HERITAGE

WHILE new movements and new methods of justice were emerging toward the end of the nineteenth century, the frontier was disappearing. Most lands suitable for cultivation, once regarded as inexhaustible, had been appropriated to private uses. A few observers began to anticipate a time when the prodigal exploitation of land and timber must come to an end. Sporadic agitation began for legislation to preserve forests and cultivate timber.<sup>1</sup>

Forest lands throughout the East had long since passed into private ownership. In the West, however, vast acreages covered with timber remained within the public domain, but subject to private appropriation under the several federal land laws. An act of 1873 and subsequent homestead laws encouraged the planting of trees on the western prairies. In 1891 the President was authorized to reserve public lands covered with timber, and soon some 18,000,000 acres were set aside as forest reserves under the jurisdiction of the Department of the Interior, but no laws were passed and no steps were taken to provide especially for their care.<sup>2</sup>

The establishment of these reserves evoked both powerful hostility and anxious praise. The sheep men of Oregon, for example, resented the closing of the Cascade reserve and petitioned for the reopening of the area to pasturage. Counter memorials were presented by citizens with other interests, who called attention to the motives of the sheep men and pointed out that the maintenance of the forests was essential to the protection of watersheds and preservation of the water supply necessary to the cultivation of the valleys below.

<sup>1</sup> Pinchot, *Progress of Forestry in the United States* (1899), Yearbook of the Department of Agriculture, 293 *et seq.*

<sup>2</sup> 17 Stat. 605, Mar. 3, 1873; 18 Stat. 21, Mar. 13, 1874; 20 Stat. 113, June 14, 1878; 26 Stat. 1095, Sec. 24, Mar. 3, 1891.

"I wish to say," ran one letter to President Cleveland, "that I have lived in Oregon all my life and I have seen the government looted of its coal lands, its timber lands and swamp lands and pretty nearly everything of any value which it possessed until now the only asset left is the land and timber contained in this Reserve. The timber lands of the Cascade Range, Mr. President, should be held inviolate for all time to come. They are the common heritage of the people. These forests act as reservoirs to hold in storage the rains and snowfalls which go to make up our navigable streams and water courses and are of vital importance to the people who inhabit this country." <sup>a</sup>

Disturbed by the fact that no provision had been made for effective administration of the forest reserves, the Secretary of the Interior had meanwhile asked the National Academy of Sciences to investigate and report on a national forest policy. The survey was conducted by a committee of six members of the Academy and one professional forester, Gifford Pinchot. The report eloquently phrased the need for the preservation of forests on those portions of the public domain not suited for cultivation, both to conserve the water supply and to provide a needed store of timber products. The protection of timber for use in the distant future, the report said, offered too little in the way of probable economic return to justify private investment for that purpose. Conservation, therefore, must be the responsibility of the government; careful administration ought to be established for the reserves already set aside, and others ought to be established. <sup>b</sup>

Even before the report was formally submitted President Cleveland acted. Instead of throwing open old reserves as the Oregon sheep men had desired, he set aside some 21,000,000 additional acres. This order was issued shortly before the expiration of his term, and the succeeding Congress, dominated by another political party, returned the land to the public domain for a short period so that it might be taken up by private interests. <sup>c</sup> In the meantime, the report

<sup>a</sup> Lane to Cleveland, April 30, 1896, Cleveland Papers, Lib. Cong.

<sup>b</sup> *Forest Policy for the Forested Lands of the United States*, Sen. Doc. 105, 55 Cong., 1 Sess.

<sup>c</sup> 30 Stat. 11, 34, June 4, 1897.



of the committee of the National Academy of Sciences was published. It was widely circulated and played a part in developing public sentiment in favor of conservation. The McKinley administration fell into line, and more reserves were set aside from time to time.

Until 1905 the forest reserves remained under the control of the Interior Department, where policy was dominated by the General Land Office traditionally concerned not with retaining and developing the public lands but rather with the rapid dispersion of natural resources for private use. A skeletal organization was eventually set up to prevent illegal exploitation and destruction by fire, but on the whole little was accomplished.

The Department of Agriculture, on the other hand, had great interest in the reserves. A Division of Forestry had long been in operation there, largely engaged in academic investigation. It took on new life in 1898, when Gifford Pinchot, a man of energy and zeal for his profession, was placed at its head. He was in a large degree responsible for the transfer of the forest reserves to a newly created Forest Service. Together with President Theodore Roosevelt and other enthusiasts, he stirred the American public to support a broad program of conservation of natural resources.

"I could have had charge of the Forest Reserves in the Interior Department but I refused, because I regarded as paramount the all important question of permanent security for the public forests," Pinchot declared some years later. "The National forest idea ran counter to the whole tradition of the Interior Department. Bred into its marrow, bone and fiber was the idea of disposing of the public lands to private owners." The Department of the Interior, he concluded, "will never be a real Department of Conservation." \*

Theodore Roosevelt aligned himself with the conservation movement immediately on succeeding to the Presidency. On his first Sunday as President, he called in Pinchot and F. H. Newell, later Chief of the Reclamation Service, and began mapping out a program. In his first message to Congress, he recommended that the President be given the power to transfer the forest reserves to the Department of

\* Pinchot, *How the National Forests Were Won*, American Forests and Forest Life (Oct. 1930).

Agriculture. Forest and water problems were perhaps the most vital internal questions of the United States, he declared, and the reclamation and settlement of arid lands would enrich every portion of the country. In subsequent messages, official and unofficial, he continued to preach the conservation gospel.<sup>7</sup>

The establishment of new reserves brought varied reactions. Railroads were accused of exchanging poor lands within the reserve areas for more valuable lands elsewhere.<sup>8</sup> Local interests were hostile when deprived of pasture or other customary privileges with public property. Local governments suffered because the lands withdrawn were not subject to taxation and no longer provided resources for taxable businesses or industries. In 1907 the opposition was strong enough to secure the attachment of a rider to an appropriation bill, providing that no new national forests should be set aside in Oregon, Washington, Idaho, Montana, Colorado, and Wyoming, except with the consent of Congress.<sup>9</sup>

The President sought a way to mitigate the mandate of the law. "If there is any human being in this country with whom I do not sympathize," he had said on an earlier occasion, "it is the type of office individual who has a roll of red tape in place of a gizzard."<sup>10</sup> Using the personnel of the Forest Service, he speeded the completion of a large number of surveys and set aside some 16,000,000 acres of new reserves before signing the bill. "Failure on my part to sign these proclamations," he wrote, "would mean that immense tracts of valuable timber would fall into the hands of the lumber syndicates before Congress had an opportunity to act, whereas the creation of the reserves means that this timber will be kept in the interest of the home-maker."<sup>11</sup>

The beginnings of forest conservation involved only routine activities on the part of the Department of Justice. Persons were prosecuted for illegal grazing on the reserved areas, for unlawfully

<sup>7</sup> Page, *Gifford Pinchot, the Awakener of the Nation*, *World's Work* (Mar. 1910); Cong. Rec., 57 Cong. 1 Sess., 85-86; Roosevelt, *The Forests in the Life of a Nation*, Proceedings of the American Forest Congress, Jan. 2-6, 1905.

<sup>8</sup> Roosevelt to Richards, May 21, 1903, Roosevelt Papers, Lib. Cong.

<sup>9</sup> 34 Stat. 1256, 1271, Mar. 4, 1907.

<sup>10</sup> Roosevelt to Richards, April 21, 1904, Roosevelt Papers, Lib. Cong.

<sup>11</sup> Roosevelt Memorandum, Mar. 2, 1907, *ibid.*

enclosing lands, for cutting timber, and for setting fires. The Attorney General was called upon to interpret the several statutes having to do with the administration of the reserves.<sup>13</sup> The department was much more active, however, in connection with the conservation of public lands not yet set aside as reserves. Fraudulent practices of various kinds had become common, such as entries upon public lands nominally for homestead purposes but actually to transfer the lands to lumber companies or other large-scale operators.

Prominent among these abuses were frauds disclosed in the Blue Mountain Forest Reserve in Oregon beginning in 1903. Speculators purchased land in the Blue Mountain area for one dollar and a quarter per acre; but before completing the acquisitions the purchasers, through representatives in Washington, sought to persuade the General Land Office to prescribe the area as one to be set aside as a forest reserve. The owners of the lands would then be given scrip for it, which they could exchange for lands in other sections of the state. They planned thereafter to exchange scrip which had cost them one dollar and a quarter an acre for timber land worth approximately five dollars and fifty cents per acre. This scheme would net a profit of some eight hundred thousand dollars.<sup>14</sup>

The Secretary of the Interior, having reason to suspect that some of his own subordinates were involved, preferred that an outside agency should conduct the investigation. The work was undertaken by a number of secret service operatives, under the direction of the Department of Justice.<sup>15</sup> Sufficient evidence was uncovered to lead to indictments against the commissioner of the General Land Office, a United States Senator, and two members of the House of Representatives.

Prosecutions were instituted by District Attorney Hall of Oregon and Francis J. Heney who was appointed to assist in the conduct of the cases. It was discovered that Hall himself was guilty of misconduct in connection with the enclosure of public lands, and he was

<sup>13</sup> See for example 22 Op. 266; *id.*, 512; 23 Op. 589; 26 Op. 421; 25 Op. 470; Ann. Rep. Dept. Agric. 1910, 871.

<sup>14</sup> Heney report, Sept. 11, 1907, D. J. File 6442-03-2; Portland *Oregonian*, Jan. 9, 1910.

<sup>15</sup> Bonaparte to Bennet, Feb. 16, 1909, D. J. File 44-3-11-3, Sec. 4; see Ch. XVIII *supra*.

removed from office, indicted, and convicted. The Senator and a Congressman were convicted of fraud in the Blue Mountain case. The Land Office commissioner was tried at Washington, D. C. for destroying Land Office records and was acquitted. He was then tried at Portland, Oregon, for participation in the Blue Mountain frauds, and again he was not convicted.<sup>15</sup>

Political influence interfered with other prosecutions and investigations. District attorneys sometimes stubbornly refused to proceed. Congress forbade the use of secret service agents by the Department of Justice.<sup>16</sup> President Roosevelt appointed a public land commission, with Pinchot as one of the members, which summarized the public land situation in a report.<sup>17</sup> The Reclamation Act of 1902 was also a part of Roosevelt's program. In 1907 he appointed an inland waterways commission, again with Pinchot as a member.

Roosevelt and Pinchot pressed their conservation crusade on all fronts, as to land, soil, timber, water rights, and other natural resources. A conference of governors held at the White House in 1908 concerned itself almost exclusively with the subject of conservation and resulted in the appointment of a national conservation commission, with Pinchot as its leader. Utilizing materials brought together by other commissions and by government departments, this commission made a report on the conditions of natural resources in the United States and thereby created a profound impression.<sup>18</sup> Private interests were meanwhile growing acutely aware of the profits to be derived from coal, oil, and other types of natural resources.

The Department of Justice was investigating and prosecuting land frauds, but, because of tradition and contrary local interest, this effort was not particularly successful. The conservationists urged more drastic steps to eliminate abuses under the homestead laws. The President's secretary asked Attorney General Moody for an

<sup>15</sup> See D. J. File 6442-03-4; New York *Times* editorial, filed with Stinson to Bonaparte, May 6, 1908, D. J. File 44-3-11-3, Sec. 1; Heney to Wickersham, Sept. 28, 1910, D. J. File 6442-03-6.

<sup>16</sup> Bonaparte to Roosevelt, Dec. 10, 1907, Roosevelt Papers, Lib. Cong.; Cong. Rec., 60 Cong. 2 Sess., 24-25, and see Ch. XVIII *supra*.

<sup>17</sup> See *Report of the Public Land Commission*, Sen. Doc. 189, 58 Cong. 3 Sess.

<sup>18</sup> *Proceedings of a Conference of Governors in the White House*, Washington, D. C., May 13-15, 1908, House Doc. 1245, 60 Cong. 2 Sess.; *Report of the National Conservation Commission*, Sen. Doc. 676, 60 Cong. 2 Sess.

opinion on the power of the President to withdraw coal lands from entry altogether. Moody submitted the question to a number of his subordinates. All answered that for public purposes the President could withdraw limited tracts from entry, although with few exceptions they did not commit themselves as to whether the mere conservation of coal would constitute a proper purpose. Some of them suggested that in any event entries could be temporarily suspended pending investigation of frauds.<sup>19</sup>

Moody wrote no formal opinion. From Pinchot the President received an opinion confidently urging that under existing laws any and all coal lands could be permanently withdrawn. The President then withdrew in seven states some 68,000,000 acres of coal lands, and about 8,000,000 acres in Alaska. He urged legislation to confirm his action. When Congress failed to concur, he issued renewed warnings as he restored to entry about two-thirds of the lands thus set aside.<sup>20</sup>

Throughout his term of office Roosevelt vigorously sought to advance the cause of conservation in general. He withdrew from entry not merely coal and forest lands, but also great tracts for the preservation of water resources and to protect sites for reservoirs, power plants, and game refuges, areas containing phosphate deposits, and tracts within reclamation areas. To reports of various conservation commissions, committees, and conferences was added that of a North American conservation conference at Washington, D. C. The reports of these several groups were submitted to Congress with recommendations.<sup>21</sup>

President Taft spoke with genuine warmth of conviction on the desirability of protecting natural resources and their intelligent use. In comparing speeches on this subject made by the two Presidents, the editor of a farm magazine declared that Taft discussed conservation as a great jurist, while Roosevelt discussed it as a preacher of

<sup>19</sup> Loeb to Moody, April 18, 1906, D. J. File 91-0, Sec. 1; see Opinions of Russell, May 1, 1906, Campbell, May 1906, Burch, May 2, 1906, Hoyt, May 3, 1906, McReynolds and Purdy, *ibid.*

<sup>20</sup> Pinchot to Loeb, April 14, 1906, *ibid.*; Lawler to Sec. Int., May 20, 1909, *ibid.*; Roosevelt to La Follette, Jan. 23, 1907, Roosevelt Papers, Lib. Cong.; Roosevelt to Wilson, June 7, 1907, *ibid.*

<sup>21</sup> Lawler to Sec. Int., May 20, 1909, D. J. File 91-0, Sec. 1; *North American Conservation Conference*, Sen. Doc. 742, 60 Cong. 2 Sess.

righteousness."<sup>22</sup> Roosevelt was a reformer, restless under restraint. It was inevitable that Taft's conservation program should exhibit substantial differences.

Much of the Roosevelt program, in particular where withdrawals of lands from entry were concerned, had been carried out through his Secretary of the Interior, James R. Garfield, who gave it full support. Taft's Secretary of the Interior was Richard A. Ballinger of the State of Washington, who held other views. Shortly after taking office Ballinger announced to employees in the Reclamation Service his belief that the withdrawals made by his predecessor for the purpose of conserving water resources had been illegal. He directed investigations preliminary to restoring the tracts to the public domain.

When a Senator from Idaho asked the specific legal authorization by which lands had been withdrawn, Ballinger directed a subordinate to draft a reply. The subordinate's draft stated that the Attorney General had been asked for an opinion and that policy would be adjusted according to law. Ballinger changed it to read that the question would be determined "in conjunction with the Attorney General." He did not ask the Attorney General for a formal opinion, though he said later that he had consulted with him at luncheon. He nevertheless ordered the restoration of the Idaho and other lands to entry."<sup>23</sup>

Some years earlier Clarence Cunningham of Spokane, Washington, had become interested in coal lands in Alaska. Since the statutes provided narrow limits to the acreage to be acquired by individual applicants, he used the names of a number of other persons as well as his own for the purpose of making a total of thirty-three entries. The device became all the more obvious when negotiations were entered for transferring the land in question to a Morgan-Guggenheim syndicate.

Under the Roosevelt administration, Ballinger had been for a time commissioner of the General Land Office in the Department of

<sup>22</sup> *Wallaces' Farmer*, Sept. 23, 1910.

<sup>23</sup> See testimony of A. P. Davis, *Investigation of the Department of the Interior and of the Bureau of Forestry*, Sen. Doc. 719, 61 Cong. 3 Sess., V, 1700 *et seq.*; *id.*, II, 356 *et seq.*, 722; Taft to Garfield, Nov. 24, 1909, *id.*, V, 1559.

the Interior. He had resigned to return to private law practice, and his firm handled business for the Cunningham interests. Attempts were being made to complete the process of patenting the lands when he returned to the Interior Department as its head. Assertions were made that Ballinger and some of his subordinates were serving the private interests.

The situation was revealed when a disagreement arose as to the interpretation of a statute of 1908 permitting the consolidation of small claims made "in good faith" by entrymen "in their own interests." The question was whether the statute permitted the consolidation of claims which, as had been said of those of Cunningham, had been made in illegal anticipation of disposal. A letter was drafted in the Land Office for the signature of the Secretary of the Interior, asking the opinion of the Attorney General, but it was not sent. Ballinger turned the question over to First Assistant Secretary Frank Pierce who, instead of calling on the Attorney General, had law officers in the Interior Department prepare an opinion which he himself signed. Pierce believed that the statute "was a curative act and should be liberally construed" and the mere fact "that technical objection might have been raised as to the good faith of the claimant or entrymen" should not stand in the way.<sup>44</sup>

The investigation of the Cunningham entries had been in the hands of Louis R. Glavis, Chief of the Field Division of the General Land Office. Alarmed at Pierce's opinion and unwilling to proceed under it, he told of his dilemma in conversation with Henry M. Hoyt, an assistant district attorney who happened to be in Washington and who had worked with Glavis in similar land cases. Hoyt took the matter up with Attorney General Wickersham and showed him the Pierce opinion and other documents. "You ask Mr. Glavis to come here to my office at 10 o'clock sharp tomorrow morning," directed Wickersham. "There will be a Cabinet meeting at 11 o'clock. He can come in here at 10 o'clock and see me and then I can truthfully say to the Secretary that Mr. Glavis has been to see me about it and that he is troubled, and that in view of all the cir-

<sup>44</sup> 35 Stat. 424, May 28, 1908; *Investigation, supra*, II, 207; Pierce to Commr. Gen. Land Office, May 19, 1909, *id.*, 209.

cumstances I really think he better send those matters over to me for a decision of the law department of the Government." Glavis saw the Attorney General, the Attorney General talked with Ballinger, and the documents were submitted for an official opinion. Wickersham held that Pierce had been clearly wrong as to cases where the entry had not been made in good faith as the statute provided."<sup>22</sup>

The legality of the Cunningham entries had never been officially determined. The Land Office, in carrying the matter to a decision, withdrew Glavis from the case. The Cunningham claims covered lands which by subsequent presidential proclamations were to be included in a national forest, if the entries were illegal. For that reason Glavis took the matter to Pinchot, who was still at the head of the Forest Service. Sensing another attack upon the conservation policies established under the Roosevelt administration, Pinchot declared that the evidence should be laid before President Taft, and he gave Glavis a letter to him."<sup>23</sup>

On August 18, 1909, Glavis left with the President, who was spending the summer at Beverly, Massachusetts, a lengthy report with supporting documents to show both the invalidity of the Cunningham claims and a concerted attempt on the part of Ballinger and a number of his subordinates to secure the patents for the claimants in spite of the unlawful entries. Taft showed the materials to Attorney General Wickersham, who was in the neighborhood. The President and the Attorney General met with the Secretaries of the Treasury and of the Navy. It was decided that jealousy between the Forest Service on the one hand and Interior Department bureaus on the other was probably responsible for the attitude of Interior Department officials. The President and his advisers thought that Glavis ought nevertheless to be answered so far as he had cast aspersions of bad faith on Ballinger and his subordinates.

Copies of the Glavis statement were sent to the persons accused, who prepared written replies. Ballinger, who had been in Seattle, returned to the East to confer with the President. He took with him Oscar Lawler, Assistant Attorney General for the Interior Depart-

<sup>22</sup> *Id.* IV. 776; 27 Op. 412.

<sup>23</sup> *Id.*, IV, 1218-1219.



ment, who while district attorney at Los Angeles had been the subject of sharp criticism from Glavis. Taft, who had not the time to prepare a reply to Glavis, asked Lawler to prepare one."

The public had already become aware of the Glavis charges and of the President's request for comments from various members of the Interior Department. Former differences between the Forest Service and Interior Department bureaus had resulted in sharp interchanges, and these found their way into the press." Lawler prepared a document designed to refute both the Glavis charges and others currently made against the Interior Department by members of the Forest Service and by conservationists generally. Lest the contents be disclosed in some way, all preliminary drafts were carefully guarded and on completion of the task were burned in an open grate."

Taking his final draft and supporting documents, Lawler set out for Boston. He met Attorney General Wickersham in New York, left a copy with him, and took the remaining copies to the President's secretary. Lawler's antagonism toward Glavis and Pinchot was so interwoven in the text that the President was unwilling to use it as it stood. The Attorney General went over the records, and after conference a revised draft was prepared. It was in the form of a letter from Taft to Ballinger, dated September 13, 1909. The Glavis charges were found to be "only shreds of suspicions"; Ballinger was a man not only of "highest character and integrity" but of "ability and experience"; the requested authority to discharge Glavis was granted because instead of proceeding upon "trustworthy evidence" he had submitted a "disingenuous statement" upon mere suspicions; and various charges in the press against Ballinger were denied."

On the same day, addressing him as "My Dear Gifford," Taft sent Pinchot a copy of his letter to Ballinger, called attention to the fact that Pinchot was not mentioned in the letter, and urged him not to resign. On the subject of Ballinger, Taft said, "I think you have

" *Id.*, VIII, 4548; Taft to Nelson, May 17, 1910, *id.*, 4393-4394.

" See the *Washington Post*, Aug. 26, 1909.

" *Investigation, supra*, VIII, 4458, 4490 *et seq.*

" *Id.*, 4507, 4393-4394, 4496; Taft to Ballinger, Sept. 13, 1909, *id.*, IV, 1187.

allowed your enthusiastic interest in the cause of conservation to mislead you." Not to discharge Glavis, he asserted, "would be fatal to proper discipline." He had been greatly disturbed by newspaper stories of the controversy between departments, and he asked Pinchot's help to bring the matter to a close.<sup>11</sup>

Pinchot replied with a long letter making extensive charges against the Interior Department in connection with coal claims, forest ranger stations, Indian forests, water power, and reclamation. The actions of Secretary Ballinger, he said, had been harmful to the public interest in the most critical and far-reaching problem the nation had faced since the Civil War. "Both because of his attitude and of what he did," concluded Pinchot, "I am forced to regard him as the most effective opponent the conservation policies have yet had." Taft replied coldly to "My Dear Mr. Pinchot," declared that his opinion of Ballinger had not changed, and hoped that Pinchot would remain as Chief Forester and help bring the public altercation to an end.<sup>12</sup>

In the meantime Glavis had prepared his version of the whole dispute, which was published in *Collier's Weekly* on November 13, 1909. It stirred such a furor that Congress felt called upon to intervene. On December 21, 1909, the Senate asked the President for reports, statements, papers, or documents upon which he had relied in reaching his conclusions.<sup>13</sup>

Pinchot asked permission of the Secretary of Agriculture to send a letter to be read in the Senate at the time of the arrival of the letter from the President. The Secretary advised against it, but Pinchot nevertheless sent a letter dealing with the conduct of two members of his bureau. On the following day the President wrote Pinchot, this time addressing him as "Sir," denouncing his conduct as a reflection upon the President, and stating that it was now a matter of duty to direct his removal from office. "When the people of the United States elected me President," he concluded, "they placed me in an office of highest dignity and charged me with the

<sup>11</sup> Taft to Pinchot, Sept. 13, 1909, *id.*, 1220.

<sup>12</sup> Pinchot to Taft, Nov. 4, 1909, *id.*, 1223; Taft to Pinchot, Nov. 24, 1909, *id.*, 1230.

<sup>13</sup> *Id.*, II, 3-4.

duty of maintaining that dignity and proper respect for the office on the part of my subordinates." \*\*

Pinchot's dismissal stirred the wrath of the conservation forces. Aware of the political implications of the struggle, Congress authorized an investigation by a joint committee of the two houses. The hearings began on January 26, 1910, continued until May 20, and were followed by two days of arguments by counsel. George Wharton Pepper, later Senator from Pennsylvania, represented Pinchot. Louis D. Brandeis, soon to become an associate justice of the Supreme Court after a bitter fight on his confirmation, appeared for Glavis. The records were compiled in thirteen substantial volumes. The proceedings for the most part were highly inconclusive, hardly demonstrating more than the President's error in too promptly making himself the loyal sponsor and advocate of one of the parties to a serious governmental quarrel.

Attorney General Wickersham was subjected to the same criticism. Using the materials relied upon by Taft, as well as other materials, he prepared a long summary and report on all aspects of the several controversies between the Interior Department and the Forest Service, along the line taken by the President. In response to a Senate resolution, these with other papers were sent to the Senate by Taft. They were dated September 11, 1909,\*\* and thus conveyed the impression that they had been used as the basis of the Taft letter exonerating the Interior Department and directing the dismissal of Glavis. During the investigation Brandeis thought he discovered that the document was so phrased as to answer charges made by Glavis in *Collier's Weekly* in November but which had not been made as early as September.

To show that the report had been predated, Brandeis asked the committee to call on the Attorney General for all drafts of the document, for the records on which it was based, and for statements as to the persons responsible for its preparation. The request was denied by a party vote, though one Republican voted with the Demo-

\*\* Pinchot to Dolliver, Jan. 5, 1910, *id.*, IV, 1283; Taft to Pinchot, Jan. 7, 1910, *id.*, 1289.

\*\* *Id.*, II, 718, 731.

crats in favor of granting the request. Brandeis secured permission to state his reasons for the request, but after argument the vote remained unchanged. Taft sent a letter to the chairman of the committee explaining the sequence of events. The Wickersham opinion was dated the 11th, but Taft's letter told only of discussion on the 12th with Wickersham who had made notes of an examination of the record during the day."

The conservation issues were aptly phrased in George Wharton Pepper's brief for Pinchot. "To 'do a land office business' has become a popular way of characterizing a transaction in which every effort is made to satisfy an eager demand," said Pepper. "All the evils incident to such a business have from time to time characterized the administration of the Land Office." And, he concluded, "to have a 'Land Office conscience' is another phrase that has passed into popular use." "

The committee, which included Senators Root and Sutherland, reported by the same party vote. "The evidence has wholly failed to make out a case," concluded the majority. "Neither any fact proved nor all the facts put together exhibit Mr. Ballinger as being anything but a competent and honorable gentleman, honestly and faithfully performing the duties of his high office with an eye single to the public interest." The minority disagreed. Pinchot and Glavis, they said, had prevented the consummation of a great public wrong. Ballinger, they thought, had been frequently "uncandid," guilty of "duplicity," "deceiving" to the President, and should be asked to resign."

Ballinger felt called upon to resign a short time later. When the Cunningham claims, upon which the controversy had started, were eventually passed upon by a commission in the Department of the Interior, the entries were held for cancellation."

A copy of a western newspaper was sent to the Attorney General telling of delight at the resignation of Ballinger. Wickersham sent

" *Id.*, VII, 3415-3417, 3622 *et seq.*; *Id.*, VIII, 4393-4394.

" *Id.*, IX, 5184-5187.

" *Id.*, I, 90, 146, 192.

" *U. S. v. Andrew L. Schofield, et al.*, 41 Decisions of Dept. of Int. Relating to Public Lands, 176, 240.

it to the President. "That the United States Attorney and the Postmaster should take this opportunity to express the gratification which is felt by the Pinchoites," he remarked, "inspires me with the same desire towards them which Herodias entertained for John the Baptist." Taft replied, "I wouldn't mind taking their heads, but it would cause too much of a row, and probably they didn't say it exactly as it is reported, because the Omaha News is a muckraking paper." <sup>40</sup>

To land and timber problems and litigation <sup>41</sup> there was soon added the problem of conserving the national oil supply, to which attention had first been called by the Geological Survey in the latter part of the Roosevelt administration. Secretary Ballinger had recommended the protection of oil supplies for naval purposes. Some three million acres in California were withdrawn upon the informal order of President Taft, pending action by Congress. <sup>42</sup>

Much doubt had been expressed as to the legality of withdrawal orders not provided for by statute. In the case of these oil lands, trespassers continued to enter and exploit them in spite of the order. Eventually, on June 25, 1910, Congress authorized withdrawals. New orders were issued covering the same areas. Questions still remained as to the validity of the original order and as to the prosecution of persons who had acted in violation of it. On December 24, 1910, Ballinger asked the Attorney General for an opinion whether the original order had been valid. <sup>43</sup>

The Attorney General had theretofore warmly approved an opinion by Lawler that the President had no authority to withdraw lands except upon express legislative enactment. But now such an order had actually been issued at the direction of the President. After struggling with drafts of replies to Ballinger's letter, Wickersham

<sup>40</sup> Omaha News, Mar. 7, 1911; Wickersham to Taft, Mar. 14, 1911, D. J. File 156038-2; Taft to Wickersham, Mar. 17, 1911, D. J. File 156038-3.

<sup>41</sup> One long drawn litigation dealt with millions of acres of lands in Oregon, originally granted to the Oregon and California Railroad in 1866. Suit was authorized by Bonaparte in 1907, and the matter did not terminate until 1925. *Oregon & Calif. R. R. Co. v. U. S.*, 238 U. S. 393 (1915); *Oregon & Calif. R. R. Co. v. U. S.*, 243 U. S. 549 (1917); *U. S. v. Oregon & Calif. R. Co.*, 8 Fed. (2d) 645 (1925); Ann. Rep. Atty. Gen. 1914, 35.

<sup>42</sup> Ballinger to Taft, Sept. 17, 1909, D. J. File 128-0, Sec. 1; Ballinger to Wickersham, Dec. 24, 1910, *ibid.*

<sup>43</sup> Ballinger to Wickersham, Dec. 24, 1910, *ibid.*

finally saw him personally, and plans were made for a test case by which the issue would be judicially determined."<sup>44</sup>

For two years the Justice and Interior Departments discussed problems of procedure. It was contemplated that the suit would be conducted by B. D. Townsend, who already had responsibility for much government litigation connected with oil lands but whose unhurried handling of some Oregon land cases had caused much local exasperation. It was decided that the suit should be brought in Wyoming. Townsend proceeded in such leisurely fashion that the Attorney General finally grew impatient and tried to accelerate matters. The case was instituted only after Assistant Attorney General Knaebel had made a trip to the Pacific Coast to confer with counsel."<sup>45</sup>

Shortly before the bill of complaint was filed the Senators from Wyoming went to President Taft to recommend revocation of the order withdrawing Wyoming lands from entry, urging that there were both equitable and political reasons why private interests should be permitted to continue the development of the oil resources in their state. Taft asked the Attorney General to withhold the suit until after consultation, but it was too late since Assistant Attorney General Knaebel was already in the West and filed the suit the next day."<sup>46</sup>

The Wyoming Senators had deposited with the President a mass of evidence to support their plea for revocation of the withdrawal order. This material was sent to the Department of Justice for examination. Knaebel inspected it and repeatedly heard arguments of counsel for the Midwest Oil Company. He prepared for the Attorney General a memorandum recommending revocation of the order with respect to certain lands, such as those on which expenditures had been made before the parties had knowledge of the withdrawal order. The Attorney General forwarded the memorandum to the President."<sup>47</sup>

<sup>44</sup> Wickersham to Lawler, April 22, 1910, D. J. File 91-0, Sec. 1; Wickersham to Knaebel, Mar. 1, 1911, D. J. File 128-0, Sec. 1.

<sup>45</sup> Wickersham to Townsend, Nov. 18, Dec. 13, and Dec. 16, 1912, D. J. File 162643, Sec. 1; Wickersham to Taft, Feb. 11, 1913, *ibid.*

<sup>46</sup> *Ibid.*; Ridgley to Wickersham, Feb. 14, 1913, *ibid.*

<sup>47</sup> Knaebel Memorandum, Feb. 26, 1913, *ibid.*; Wickersham to Taft, Mar. 1, 1913, *ibid.*

Taft read the report, and on the last day of his administration wrote to Wickersham and Secretary of the Interior Walter L. Fisher, who had succeeded Ballinger, giving his impression that the order ought to be revoked as to some if not all the claims. Since the evidence was produced by only one side, however, and was believed by the Interior Department to be in some respects subject to refutation, Taft thought the question ought to be left for further investigation.<sup>44</sup> The lands withdrawn were not restored to the public domain, and the suit was carried forward to determine the validity of the withdrawal order.

The case was argued in the district court in May 1913. The government lost and appealed. The case was argued before the Supreme Court in January and again in May 1914. On February 23, 1915, the Supreme Court, dividing five to three, reversed the decision of the court below and held that in withdrawing the lands from entry the President had not exceeded his powers. Counsel for the Midwest Oil Company immediately applied for a settlement at a low figure, and after much discussion and correspondence the government accepted a compromise.<sup>45</sup>

Controversies over the title to oil lands brought the Department of Justice once more into litigation with its perennial opponent, the Southern Pacific Railroad. Long after land grant patents were issued, the government discovered that oil underlay a considerable area where the railroad company had received alternate sections. The act making the grant<sup>46</sup> had provided that mineral lands, which under the law includes oil, should not be conveyed. The Interior Department had issued patents without investigation, seeking to protect the rights of the government merely through a provision in the patents "excluding and excepting all mineral lands should any such be found in the tracts aforesaid."

When the Southern Pacific was eventually discovered to be in possession of oil lands of immense value, the validity of its title was first contested in a suit by private parties who maintained that, be-

<sup>44</sup> Taft to Atty. Gen. and Sec. Int., Mar. 3, 1913, *ibid.*; Knaebel Memorandum, June 14, 1913, *ibid.*

<sup>45</sup> Knaebel to Pinchot, June 18, 1913, *id.*, Sec. 2; *U. S. v. Midwest Oil Co.*, 236 U. S. 459 (1915); Knaebel to Sec. Int., June 3, 1916, D. J. File 162645, Sec. 3.

<sup>46</sup> 14 Stat. 292, Sec. 3, July 27, 1866.

cause the lands had proved to be mineral, title had not passed to the company. Under the mining laws they sought to claim the lands for themselves.

Attorney General Wickersham became interested in the case while it was pending in the circuit court at Los Angeles. He detailed a special representative to confer with counsel for the private interests before the argument was submitted. On March 13, 1911, Judge Ross of the circuit court held that the provision in the patents excepting mineral lands was invalid.<sup>11</sup>

An appeal was taken to the circuit court of appeals. The government employed as counsel B. D. Townsend, who had represented the private parties in the court below. Although the employment of counsel showed the Department of Justice to be prepared to protect any interest which the government might have in the matter, Wickersham had written the Secretary of the Interior expressing approval of the decision of the trial court. The reasoning of the court, he declared, seemed to him to be conclusive.<sup>12</sup> In the course of time, while searching for evidence to support their position, counsel for the Southern Pacific discovered this letter in the Land Office records.

The private parties with whom the department had aligned itself were astounded when the opposition produced the letter. A telegram brought a hasty reply from Assistant Attorney General Knaebel, written in Wickersham's absence. It was not a formal opinion, he declared, but was a confidential communication to the Secretary of the Interior, discussing difficulties suggested by Judge Ross's decision. He could not conceive that any court would be influenced by a letter which appeared to have been surreptitiously obtained and which was used without connection with other correspondence. The newspapers reported a sensation in court when the original letter was submitted, to be followed by the Department of Justice telegram repudiating it and suggesting that it had been wrongfully acquired.<sup>13</sup>

Wickersham wrote the Secretary of the Interior. "The letter,"

<sup>11</sup> Wickersham to Dist. Atty., Nov. 18, 1910, D. J. File 160788, Sec. 1; McCormick to Wickersham, Mar. 14, 1911, *ibid.*

<sup>12</sup> Wickersham to Sec. Int., Mar. 29, 1911, *ibid.*

<sup>13</sup> Burke to Wickersham, Oct. 14, 1911, D. J. File 153972, Sec. 2; Knaebel to Burke, Oct. 14, 1911, *ibid.*; Knaebel to Wickersham, Oct. 16, 1911, *ibid.*; Washington Post, Oct. 18, 1911, *ibid.*



he said, "was evidently surreptitiously purloined from the files of your Department and furnished to the attorneys." He called attention to Knaebel's statement that such things had happened before and suggested an investigation to ascertain how this letter had found its way into the hands of parties adverse in interest. The Secretary replied that the letter had in no way been marked personal or confidential and that he had received no impression from reading it that it was so intended. There had therefore been nothing irregular in the use to which it had been put. If information could be provided as to the misuse of correspondence in other instances, he would be glad to hear about it. The Attorney General and the Secretary of the Interior met and talked the matter over, whereupon Wickersham wrote that he knew of no recent instances of abuses and that he now quite understood the circumstances under which his letter had come into the hands of the attorneys for the railroad company."<sup>4</sup>

The case—*Burke v. Southern Pacific Railroad*—was carried to the Supreme Court, where the decision was the same as that of the court below which the Attorney General had approved. It did not settle all questions as to the title to oil lands patented to the Southern Pacific, but made it necessary to prove fraud on the part of the company before the lands could be recovered."

In the autumn of 1910 a mining congress which met in Los Angeles urged government action to recover oil-bearing lands patented to the land grant railroads. The matter was brought to the attention of the President, who referred it to the Secretary of the Interior. Ballinger, who was then in office, saw little possibility of recovering these lands. Too long a period had elapsed since the date of the patents. He directed an investigation by the Geological Survey with respect to 6560 acres more recently patented in the Elk Hills region in California, in order to discover whether there was evidence that the presence of minerals was known to the company when the lands were patented."

On the basis of evidence thus disclosed, it was decided to insti-

<sup>44</sup> Wickersham to Fisher, Oct. 19, 1911, *ibid.*; Fisher to Wickersham, Oct. 23, 1911, *ibid.*; Wickersham to Fisher, Oct. 23, 1911, *ibid.*

<sup>45</sup> *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669 (1914).

<sup>46</sup> Ballinger to Taft, Oct. 27, 1910, D. J. File 153972, Sec. 1.

rate a suit, filed on December 10, 1910. Testimony was taken over a considerable period of time. Delay made possible the continued exploitation of the lands in question. It was not until August 9, 1915, that a decision was reached in the district court favorable to the government. An appeal was taken to the circuit court of appeals, and on May 6, 1918, the decision of the lower court was reversed."

An appeal to the Supreme Court brought reversal of the decision of the circuit court of appeals. Assistant Attorney General Kearful argued the case with the assistance of J. Crawford Biggs, who was to become Solicitor General fifteen years later. Evidence taken from the files of the company revealed knowledge of the presence of minerals when the patents were issued, the Court held, thereby demonstrating fraud in the application." The ruling was a victory for the government, but between the first steps and the decision of the Supreme Court nine years had elapsed during which the company had continued to remove oil.

A number of other suits against the Southern Pacific Railroad were instituted, among which was one dating from December 20, 1912, known, because of its number on the docket, as "Civil 46." When it was at length lost in the district court and the Department of Justice decided that an appeal would be futile, Secretary of the Navy Daniels protested because part of the lands lay in oil reserve areas set aside for use of the Navy. He had read the opinion of the district court, thought it far from conclusive, and urged that the case be taken to the Supreme Court. Attorney General Palmer assured him that he had investigated the matter thoroughly and would be willing to discuss it, but he saw no justification for an appeal since the record presented no question of law or fact upon which the government could hope for a reversal."

A protest against the abandonment of the case was also received from Gifford Pinchot, now president of the National Conservation Association. "I have neither the desire nor the qualifications to argue with the Attorney General of the United States the legal subtleties

" *Southern Pacific Co. v. U. S.*, 249 Fed. 785 (1918).

" *U. S. v. Southern Pacific Co.*, 251 U. S. 1 (1919).

" Justice to Knaebel, Feb. 15, 1916, D. J. File 164672, Sec. 2; *U. S. v. Southern Pacific Co.*, 260 Fed. 511 (1919); Daniels to Palmer, Dec. 6, 1919, D. J. File 164672, Sec. 4; Palmer to Daniels, Dec. 9, 1919, *ibid*.

of this or any other case," he declared. "But of one thing I am convinced: that nothing less than the decision of the Supreme Court should be allowed to give to the Southern Pacific Railroad public property worth in the neighborhood of five hundred million dollars, which it was the clear intention of the law should never come into its possession." \*\*

The Attorney General failed to reply, whereupon Pinchot wrote an indignant remonstrance to President Wilson. As is customary in such cases, the President forwarded the letter to the Attorney General. Palmer issued a public statement. "In such circumstances no lawyer would advise a client to enter an appeal, and any appellate court would consider such an appeal to be almost frivolous," he said. "I cannot assent to the doctrine that it is the Government's duty to clog the courts with frivolous and hopeless appeals, or to harass business interests of the country by prolonging litigation entirely without hope of recovery on the part of the Government." \*\*

When the two important government cases against the Southern Pacific had been initiated, the government had some hope of winning on the provision in the patents to the effect that title should not pass if the lands were mineral. After the decision in the *Burke* case it became necessary to rely upon proof of fraud. Records were discovered in the files of the Southern Pacific Railroad which supplied such proof in the *Elk Hills* case, but in *Civil 46* the evidence found in the same files indicated that the company had not known of the presence of oil at the time of the acquisition of the lands. Government counsel, without success, had tried to prove fraud by circumstantial evidence. There were other complications, and an appeal was not taken. The incident served, however, to focus attention upon the broad powers of the Attorney General in deciding whether or not cases should be appealed.

There were other matters having to do with the prevention of depredations on oil lands in the West. When in 1912 President Taft had set aside two large areas of oil lands in California as reserves for naval purposes and when in 1915 President Wilson had set aside

\*\* Pinchot to Palmer, Jan. 9, 1920, *ibid.*

\*\* Pinchot to Wilson, Feb. 3, 1920, D. J. File 164672, Sec. 3; press release, Feb. 9, 1920, *id.*, Sec. 4.

another in Wyoming, these areas were looked upon with greedy eyes. Attempts on various grounds were made to establish claims sufficient to justify the removal of the valuable resource. The Southern Pacific was taking oil from lands in spite of the pending questions of title, and from other public lands oil was likewise being removed with or without plausible legal excuse.

The problems were so intricate and the cases moved so slowly that in 1913 E. J. Justice was sent to California to assume general supervision over all government oil cases and to keep the Department of Justice informed. It was advisable to protect wells on lands which the government claimed, to prevent damage from the flow of water or from other causes. Furthermore, had there been no wells on these lands it would have been advisable to have them drilled, since wells on adjoining privately owned lands would otherwise drain the oil beneath. This was particularly characteristic of the Southern Pacific lands, where the grants were laid out in alternate sections. The situation thus arising became a plausible argument for the removal of oil from government lands, even in the areas which had been set aside as reserves for future naval use. There was also an undeniable public demand for a continued supply of oil. Hence it was not deemed wise to resort to injunctions to stop all operations pending determinations of title.

E J Justice recommended that the net proceeds of oil removed be impounded until the cases in question were decided,<sup>62</sup> and this was done in many suits despite bitter objections. Those who claimed the lands began to exert pressure on Congress, where measures were introduced which would surrender the rights of the government.

The claimants found comfort and support in the Interior Department, but the Navy Department vigorously opposed concessions wherever the naval reserves were affected. The Department of Justice assumed no official position as to policy. Because of its duties in connection with the prosecution of suits and its position as the center of legal advice and information in the government, many of the proposed measures were submitted for advice and criticism. Having set out to win the cases in dispute, the Department viewed

<sup>62</sup> Justice to Lane, Mar 18, 1914, D J File 128-0, Sec 1

with apprehension measures which would deprive the government of the fruits of possible victory and usually aligned itself with the Navy Department in defense of conservation.

On May 1, 1914, Secretary of the Interior Lane referred to Attorney General McReynolds a bill for the leasing of oil lands in the disputed areas. It provided that persons having claims dating from a certain period might surrender these claims to the government and receive a lease for the property, paying to the government a royalty of not more than one-eighth of the oil or gas extracted. The leases were to be made at the discretion of the Secretary of the Interior. "Generally speaking it would seem that the effect of the measure would be to afford relief to operators who have made expenditures in the development of oil or gas," Lane explained, "and would operate to relieve this Department and yours from a large amount of the expense and work which will be entailed in investigating and adjudicating the claims to the lands presented under the general mining laws." \*\*

Attorney General McReynolds disapproved on many grounds. "I am apprehensive lest in its practical workings it might spell the ruin of the special reserves in California," he declared, "and produce such a situation both there and elsewhere that no safe reserve of oil could be made in any part of the public domain." Moreover, McReynolds suggested, it would be a reward for diligence in disobedience of the law, discriminate against those who abided by the withdrawal orders, crown with success those who were particularly persistent in disobeying them, and assist a few large corporations to control the oil industry in California.\*\*

The measure failed to pass. Yet, in some form it reappeared year after year, to be discussed in congressional committees and to require correspondence and conferences among the President, the Attorney General, and the Secretaries of the Interior and the Navy. The Department of Justice objected to the surrender of public rights to private interests, the Secretary of the Navy insisted on the preser-

\*\* Lane to McReynolds, May 1, 1914, *ibid.*

\*\* McReynolds to Sec. Int., May 13, 1914, *ibid.*

vation of the naval reserves, and the Secretary of the Interior urged measures for the protection of the "equities" of the oil industry.

Other bills in the interest of the oil claimants were introduced in 1914 with more success. As enacted, they took the form of a measure authorizing the Secretary of the Interior to make contracts whereby certain claimants to titles not yet established might meanwhile continue to dispose of oil and gas under terms prescribed by him. In a letter to the Secretary of the Navy, Acting Attorney General John W. Davis had raised serious objections. He thought the oil supply in the withdrawn areas might be depleted rather than conserved, since the Secretary of the Interior would probably not feel justified in refusing to enter into agreements with any of the applicants who made some showing of a claim. "This bill might operate peculiarly to the advantage of those who in disobedience of the President's orders of withdrawal went upon the lands and commenced drilling operations," said he, following the line suggested a month earlier by McReynolds, "and it would seem to discriminate against those who, abiding by the withdrawal orders, refrained from efforts to establish themselves." \*\*

The Secretary of the Interior began to make agreements by which the removal of oil would be permitted pending the settlement of questions of title. He required that one-eighth of the proceeds be placed in escrow to protect the rights of the government in case of adverse decision as to title, but he permitted the operators in any event to retain the other seven-eighths. This policy immediately made trouble for E. J. Justice in his handling of government oil suits. Defendants protested that the Department of Justice was unduly harsh in requiring the deposit with a receiver of all net proceeds in injunction cases, whereas the Secretary of the Interior was satisfied under similar circumstances with only one-eighth of the oil involved.

Justice explained the situation to Attorney General Gregory, who suggested to the Secretary of the Interior that a larger deposit be required. "The applicants should be allowed," thought Gregory,

\*\* 38 Stat. 708, Aug. 25, 1914; Davis to Daniels, June 16, 1914, D. J. File 128-0, Sec. 1.

"only a sufficient proportion of the production to cover actual operating expenses with a reasonable profit." Secretary Lane agreed warmly that the operators should have operating expenses and a reasonable profit; but, on the basis of a hearing which he had held in California, he was convinced that this would require an award of at least seven-eighths in most cases. Indeed, even where the costs somewhat differed, he did not see how contracts could be made to discriminate among the several applicants." Leases continued to be made to large numbers of claimants, and profitable operation was carried on for considerable periods, even though ultimate decisions were against the claimants. There was no incentive for the claimants to hurry the cases along; whatever the outcome they retained their profits.

The commissioner of the General Land Office customarily wrote to E. J. Justice for advice as to the making of operating contracts in particular cases. Justice in most instances advised against them, but the contracts continued to be made. He finally drafted a telegram stating that since his advice was so generally rejected there was no point in giving it further; but instead of sending the message he submitted it to Attorney General Gregory for instructions. "I can, of course, exercise self control so as to masquerade it for patience, but really, my patience with the Commissioner has about been exhausted," he complained. "That Department seems to have deliberately adopted the policy of aiding in the exhaustion of the oil from the lands in question, and then representatives from the Geological Survey publicly suggest that the uncontrollable production from these lands is a reason why Congress should act in favor of the trespassers." "

The Attorney General advised patience. "I have clearly defined views in regard to our duty in this matter," he wrote. "When this Department is called upon by the Interior Department for advice as to whether or not a contract should be let in any given case, we should express our views and state clearly the grounds therefor. This is all that we can properly do, because it is within the jurisdiction of

<sup>22</sup> Justice to Gregory, July 10, 1915, *id.*, Sec. 2; Gregory to Lane, July 14, 1915, *ibid.*; Lane to Gregory, July 19, 1915, *ibid.*

<sup>23</sup> Justice to Gregory, Mar. 1, 1916, D. J. File 174229, Sec. 3.

the Interior Department to determine whether or not it will under the circumstances make contracts in any given case." \*\*

Justice continued to be disturbed, however, by what he regarded as the unauthorized distribution of public property by the Interior Department. He wrote to the Attorney General concerning abuses in the Wyoming oil territory, where operators were not merely profiting hugely by means of the contracts but were reducing the amount of the government's one-eighth by selling oil at a low price to a subsidiary company. The Attorney General sent most of the letter to Secretary Lane, offering the services of the Department of Justice in protecting the rights of the government. To Justice he wrote, "as the situation now stands this Department has practically no function to perform." \*\*

Lane replied that he and E. J. Justice had such different conceptions of the act of Congress as to preclude any hope of agreement. He was of the opinion, moreover, that the one-eighth secured to the government was approximately as much as could be recovered by damage suits. He declined to authorize a general suit which E. J. Justice thought should be filed. "While I appreciate the readiness of your Department to be of assistance in these cases," he concluded, "in view of the necessity of final determination of the right to patent by this Department in any event, I do not feel warranted in recommending further suits at this time." Justice wrote another letter commenting on what he considered inconsistencies or errors in the Secretary's statement, part of which was forwarded to the Interior Department.<sup>10</sup> But there was no change of policy.

Early in 1917 Assistant Attorney General Kearful prepared for the Attorney General a memorandum showing that the Interior Department was making little or no progress in settling numerous disputed titles, while oil was being removed and seven-eighths of its value could never be recovered by the government. Attorney General Gregory sent another letter of protest to the Secretary of the Interior. "It certainly was not the intention of the law to reward trespass and fraud,"

\*\* Gregory to Justice, Mar. 8, 1916, *ibid.*

\*\* Justice to Gregory, July 11, 1916, D. J. File 162645, Sec. 3; Gregory to Justice, July 26, 1916, *ibid.*

<sup>10</sup> Lane to Gregory, Aug. 9, 1916, *ibid.*; Knaebel to Lane, Sept. 29, 1916, *ibid.*



he declared, "yet, I am constrained to say, the operating agreements which give to such claimants seven-eighths of the gross production are adapted to accomplish that result." <sup>12</sup>

During the succeeding weeks a sharp correspondence was exchanged between the heads of the two departments. The Attorney General opposed administrative measures which tended to nullify the intent of the statutes. Lane suggested submitting the questions in dispute to the public lands committees of Congress, but the Attorney General preferred to stand on the opinion which he had already formed. "The responsibility for the faithful administration of the act of August 25, 1914, is yours, not mine, and you are not bound by my opinion," he replied. "Not having been asked, my opinion should not have been offered but for the embarrassment I encountered in the discharge of my duty in the receivership cases owing to the different rule adopted by you in the analogous operating agreements. I am willing, of course, that you should make use of my opinion in connection with any recommendations you may see fit to make to the Committees of Congress, if you so desire." <sup>13</sup>

Oil interests, banks, and chambers of commerce continued to advocate further legislation. In November and December 1915 various groups petitioned the Attorney General to announce that he would suspend prosecutions until such legislation was enacted. The Department of Justice was subjected to so much criticism for its action against the oil interests that Attorney General Gregory drafted a statement explaining and defending its policy and its efforts to protect the rights of the United States.

Gregory sent the draft to Senator James D. Phelan of California for criticism. "Permit me as a friend of the administration, coming from a doubtful state, to say that your statement so hostile in its attitude and tone would irritate half our population and do harm," replied the Senator. "A plain statement without color and a declaration of your intention to enforce the law wherever violated would serve every end in view and reflect credit on your office and the administration." The Attorney General wrote a sharp letter in reply,

<sup>12</sup> Kearful to Gregory, April 21, 1917, D. J. File 128-0, Sec. 4; Gregory to Lane, June 2, 1917, *ibid.*

<sup>13</sup> Lane to Gregory, July 25, 1917, *ibid.*; Gregory to Lane, Sept. 3, 1917, *ibid.*

and then filed it as "not sent." He labeled the more formal of Phelan's two letters "impertinent and hence not answered." The statement, however, was given to the press.<sup>13</sup>

Bills were introduced in Congress, hearings were held on them, and the Justice, Interior, and Navy Departments discussed their respective merits. The ultimate surrender of some government rights to the claimants seemed inevitable. Early in 1917 President Wilson referred to the three departments a suggestion of Senator Swanson of Virginia that wells already drilled be leased to claimants who had acted in good faith and who would surrender claims to title and pay to the government an amount not less than one-eighth of the oil and gas produced. Secretary Lane thought the provisions not liberal enough to the oil men, particularly outside the naval reserves. Secretary Daniels thought them too liberal and accepted the proposals with reluctance. The Attorney General, placing the responsibility for policy on the other departments, offered no objections. Learning that a bill much more generous to the oil men was being considered, President Wilson early in 1918 wrote Lane that he could go no further than the Swanson proposal and urged Lane to support that measure.<sup>14</sup>

In 1920 an act resembling but somewhat more liberal than the Swanson proposal was passed. "All efforts of the Department of Justice to save to the United States for future development, oil lands outside the Naval Reserves, were brought to naught; and the only result was to obtain sums of money by way of royalties," reported a special assistant in the Department of Justice. "Within the reserves, the only result of the combined efforts of the Departments of Justice and Navy were to save in money one-eighth of the past production and prevent in part the drilling of new wells. But Naval Reserve No. 2 (the great producer) was already punctured by so many wells operated thereafter under the leases granted, that the natural and almost inevitable result was the cry of drainage which led to the making of the final wholesale leases by Mr. Fall." <sup>15</sup>

<sup>13</sup> Phelan to Gregory, Dec. 3, 1915, *id.*, Sec. 2; Gregory to Phelan, Dec. 3, 1915, *ibid.*; Phelan to Gregory, Dec. 3, 1915, *ibid.*; press release, Dec. 12, 1915, *ibid.*

<sup>14</sup> For the history of the events leading up to the Leasing Act of 1920, see the memorandum of Dyar, April 4, 1924, D. J. File 226016, Sec. 1.

<sup>15</sup> 41 Stat. 437, Feb. 25, 1920; The Dyar Memorandum, *supra*, 73.

The Act not only rendered futile most of the efforts previously made by the Department of Justice to enforce laws for the conservation of the oil supply but paved the way for the Teapot Dome and Elk Hills leasing scandals of the Harding administration. Land and oil litigation were to continue in a never-ending variety of forms," and the conservation of water power was soon to offer a repetition of the older story."

<sup>10</sup> See *infra* Ch. XXIII for the functions of the Lands Division of the Department of Justice.

<sup>11</sup> Federal Water Power Act, 41 Stat. 1063, June 10, 1920, as amended; Carson to Wilbur, May 29, 1930, D. J. File 19-28-2, Sec. 1; Wilbur to Carson, June 6, 1930, *ibid.*; Wilbur to Mitchell, June 9, 1930, *ibid.*; Mitchell to Wilbur, June 13, 1930, *ibid.*; Hurley to Mitchell, July 21, 1930, *ibid.*; Mitchell to Hurley, July 28, 1930, *ibid.*; Hoover to Mitchell, July 31, 1930, *ibid.*; New York Times, Mar. 11, 1930; 36 Op. 355; Thacher to Mitchell, Sept. 5, 1930, D. J. File 19-28-2, Sec. 1; Finney, *The Power Fight Goes On*, The Nation, Dec. 24, 1930; Mitchell to Richardson, Oct. 29, 1930, D. J. File 19-28-2, Sec. 2; *Appalachian Electric Power Co. v. Smith*, 4 Fed. Supp. 6, 67 F. (2d) 451 (1933), 291 U. S. 674 (1934).

## CHAPTER XX

### APPEAL TO ARMS

WHEN war swept across the continent of Europe in the summer of 1914, the tragic catastrophe seemed to presage little more than an exciting spectacle to be witnessed from afar. On the Department of Justice, an agency established primarily for the maintenance of internal order, it seemed likely to have no effect whatever. The peacetime responsibilities of law officers in the field of foreign affairs were limited to giving opinions on legal matters and investigating and prosecuting criminal offenders for violations of the neutrality laws, usually at the request of the Department of State. Beginning in the 1850's with the Walker filibustering expeditions against Nicaragua and the prosecutions resulting from British recruiting in America during the Crimean War, the Attorney General had been intermittently engaged in the enforcement of the neutrality laws. The Fenian efforts to sever Canada from British control and the numerous expeditions against Spanish Cuba and Mexico presented many delicate problems.

Soon after 1914 the work of enforcing neutrality rapidly increased, due both to the European war and to troubles on the Mexican border.<sup>1</sup> Early problems arose out of the conduct of merchant vessels. Robert Lansing, as Acting Secretary of State, called on the Attorney General for an opinion. "It is obvious," he wrote, "that unless the government has at hand some instant and effective means of dealing with vessels which are about to supply war vessels at sea, or who have already done so and have returned to American ports, possibly for a repetition of the act, the United States is in the anomalous situation of proclaiming its neutrality and yet being unable to maintain it." <sup>2</sup> The Attorney General replied that the ques-

<sup>1</sup> Ann. Rep. Atty. Gen. 1915, 44.

<sup>2</sup> See the cases discussed in D. J. File 9-10-5; Lansing to Gregory, Nov. 30, 1914, D. J. File 9-10.

tions could not be answered officially since no specific case had been submitted for decision and that "a full answer would require a substantial treatise on the law of neutrality." Specific offenders, of course, were prosecuted.

There were various types of violations, such as the efforts of Hindus on the west coast, said to be in alliance with the German consulate at San Francisco, to provide plans and equipment for an uprising against the British government in India.<sup>a</sup> However, action was hampered by the inadequacy of legislation to cover many forms of particular acts. Matters were reported, often in the interest of belligerents on one side or the other, about which the Department of Justice could do nothing. Through the German Embassy attention was called to a motion picture entitled "The Ordeal," showing atrocities of soldiers apparently wearing German uniforms. "This is the picture that created so much discussion," read an advertisement, "that special permit was required from Secretary of State William Jennings Bryan to show it." Even of this false statement there was no federal prohibition.

As the Allies made it more and more difficult to ship goods of any kind to the Central Powers, the latter began to regard the United States as a base of supply for the enemy and resorted to sabotage to prevent the production or the shipment of goods. Prosecutions were brought as offenses were uncovered. An increasing number of federal investigators were required to trace the criminal activities of foreign agents.<sup>a</sup>

Legislative gaps led the Department of Justice to unprecedented exertions to secure new laws. The task fell upon Assistant Attorney General Charles Warren. His drafts of recommendations were submitted to the Department of State and to the joint State and Navy Neutrality Board, both of which made suggestions. Changes were phrased accordingly, but the basic provisions remained as Warren

<sup>a</sup> 30 Op. 316; Warren, Memorandum for the Atty. Gen., Dec. 11, 1914, D. J. File 9-10; Lansing to Gregory, Dec. 14, 1914, *ibid.*; Gregory to Lansing, Dec. 19, 1914, *ibid.*; Hindu cases, see D. J. File 9-10-3.

<sup>a</sup> Lansing to Gregory, Sept. 23, 1914, D. J. File 9-12, Sec. 1; Warren to Sec. State, Sept. 29, 1914, *ibid.*; Enclosure, Lansing to Gregory, Nov. 9, 1914, *ibid.*; Warren to Sec. State, Nov. 14, 1914, *ibid.*; British recruiting, see D. J. File 9-15-1; sabotage, see the relevant cases among those listed in Ann. Rep. Atty. Gen. 1916, 53-54 and 1917, 50-53.

had proposed. In June 1916, after several months of preparation, eighteen printed recommendations, together with drafts of proposed statutes, were sent to committees of Congress. "Gregory Asks for Arbitrary Powers," editorialized the New York *American*. "The most unneutral thing in the United States today is the United States Department of Justice, under the direction of Attorney-General Gregory." \*

In the haste of adjournment Congress failed to act. Warren continued his efforts. When Congress met again, all except four of the seventeen proposals were united in an omnibus measure which passed the Senate in February 1917. As the end of the session approached and congressional time was consumed debating the controversial measure to arm merchant ships to meet the threat of unrestricted German submarine warfare, letters were sent from the Department of Justice to enlist the aid of the Secretary of the Treasury and the Postmaster General. However, the session came to an end on March 3, 1917, leaving the country on the verge of war without legislation needed to deal with intricate matters in the field of foreign relations. There had been pressure of other business. Strong protest against the "Spy Bill," as the omnibus measure was known, came from churches and other organizations. \*

Efforts were continued to enforce such neutrality laws as were on the statute books. The force of special agents grew, and, after conference with the Secretary of State, the appropriations for investigations were made available for investigations within the jurisdiction of the Department of State. Jealous of its prerogatives, the Bureau of Investigation of the Department of Justice engaged in sharp con-

\* *Recommendations by the Attorney General for Legislation Amending the Criminal and other Laws of the United States with Reference to Neutrality and Foreign Relations* (Gov. Printing Off., 1916); see the drafts, suggestions and other correspondence, D. J. File 9-4; Gregory to Culberson, Aug. 11, 1916, *id.*, Sec. 3; New York *American*, June 9, 1916.

Thomas Watt Gregory (1861-1933) was born at Crawfordsville, Mississippi, received his law degree from the University of Texas, practiced in Austin, was assistant city attorney, served as Special Assistant to the Attorney General in an antitrust case against the New York, New Haven and Hartford Railroad Company, and was appointed Attorney General (1914-1919). He resigned to return to private practice in Washington, D. C. Nat. Cyc. of Am. Biog., Current Volume A, 43.

\* Ann. Rep. Atty. Gen. 1916, 12-20; see the correspondence for February 1917, D. J. File 9-4, Sec. 3; Warren to Overman, Feb. 8, 1917, *ibid.*; Gregory to Webb, Feb. 15, 1917, and Warren Memorandum for Atty. Gen., Feb. 23, 1917, *ibid.*; Gregory to McAdoo and Burleson, Feb. 26, 1917, *ibid.*; D. J. File 9-4, Special Section.

troversy with the secret service agents of the Treasury Department. In late August 1916, some two hundred persons had been indicted for violation of the neutrality laws. Fifteen had been indicted under the antitrust laws for attempts to interfere with interstate and foreign commerce. The Bureau of Investigation made an index of aliens under suspicion. At the end of March 1917, just before the entrance of the United States into the war, the chief of the bureau submitted a list of five classes of persons. One class, ninety-eight in number, should be arrested immediately on declaration of war. One hundred and forty should be required to give bond. Five hundred and seventy-four were strongly suspected. Five hundred and eighty-nine had not been fully cleared of suspicion. Three hundred and sixty-seven had been cleared of specific offenses. Others, after investigation, had been eliminated from the lists. Activities were turning from the preservation of neutrality to preparations for war.<sup>1</sup>

Even before the termination of diplomatic relations with Germany, Warren pondered what should be done with the German merchant ships which had taken refuge in the ports of the United States. His research seemed to indicate that in the event of war between Germany and the United States international law would require that time be given these ships to leave American ports, unless they were under the command of military officers. Practically, there was little likelihood of their departure as an attempt to reach German harbors would almost inevitably mean interception and capture by the Allies. In American ports the crews might disable the ships or sink them in channels where they would impede the passage of other vessels. Such acts had been committed and would doubtless be repeated unless the United States took protective possession. District attorneys and marshals were instructed to take special care to prevent the destruction of the ships and to take action against those guilty of sinking ships in navigable channels. There were convictions at Charleston and elsewhere. At the request of

<sup>1</sup> Bielaski, Memorandum to Atty. Gen., April 11, 1917, D. J. File 190470, Special Section; see Gregory to Sec. Treas., Jan. 18, 1916, and other letters in D. J. File 9-1, Sec. 2; Warren to Ramseyer, Aug. 30, 1916, *id.*, Sec. 3; Gregory to Ramseyer, Sept. 22, 1916, *ibid.*; Bielaski, Memorandum for Atty. Gen., Mar. 31, 1917, D. J. File 9-5.

the Attorney General, federal judges authorized the removal of crews and the protection of ships in custody on civil or criminal libels.\*

When repeated submarine attacks resulted in the call for a special session of Congress to meet on April 2, 1917, the Department of Justice accepted the common assumption that war was inevitable. Warren prepared a draft of a presidential proclamation dealing with enemy aliens and urged that it be put into effect even before the declaration of war. "I am confident, from my consideration of the reports of the special agents, that Germans and German sympathizers in the United States intend to commit widespread crimes of violence at the very outbreak of war," he wrote to Gregory. "No time will be lost by them, and in my opinion no time must be lost by us to guard against their actions." On March 27 the district attorneys and marshals were cautioned to be watchful and were directed to examine the statutes to discover the uses to which they could be put on proclamation by the President. They were to discuss procedure with district judges and be ready for action. A letter was also sent to chiefs of police urging them to be vigilant. They were asked to keep track of stores of arms or ammunition accessible to enemy aliens, to watch their meeting places, to take precautions against incendiary fires and the misuse of explosives, and to see that "especially pernicious agitators" were restrained "in so far as the law will permit." †

Warren wrote the Secretary of State to ascertain whether or not the proposed proclamation was to be used by the President. He informed the Department of State of his fears lest destruction be wrought by German agents and of his plans for taking the leaders into custody as soon as he could lawfully do so. On April 1, another circular was sent to district attorneys reminding them of the steps which could be taken for the control of alien enemies if a proclamation were issued. On April 2, President Wilson appeared before Congress to advise a declaration of war. Four days later, the United

\* See Warren, memoranda to Atty. Gen., Feb. 2 and 3, 1917, D. J. File 190470; for other information on the same subject, see memoranda by Graham, Feb. 5, 1917, by Warren, Mar. 23, 1917 and April 5, 1917, and by Procter, April 13, 1917, all in D. J. File 190470; Ann. Rep. Atty. Gen. 1917, 54.

† Warren, Memorandum for Atty. Gen., Mar. 27, 1917, D. J. File 9-16-12, Sec. 2; Ann. Rep. Atty. Gen. 1917, 55-56.



States was at war. On the same day, April 6, 1917, the President issued the proclamation. It warned enemy aliens to obey the laws, forbade the possession of firearms, prohibited approach to forts and arsenals, and provided for detention or internment of offenders. Warren drafted and the Attorney General approved a circular to be publicized by district attorneys and marshals. "No German alien enemy in this country, who has not hitherto been implicated in plots against the interests of the United States, need have any fear of action by the Department of Justice so long as he observes the following warning: Obey the law; keep your mouth shut." Sixty-three of the aliens previously reported as particularly dangerous were arrested.<sup>10</sup>

The proclamation occasioned much excited speculation as to how the enemy alien problem would be handled. Warren took up the task of drafting specific instructions, calling on the Secretary of State for information as to methods used by the Allies. Procedure was devised for excluding enemy aliens from the vicinity of forts, navy yards, public buildings, and other works requiring protection. Permits were to be issued to those allowed within the barred zones. Many complex problems of administration developed, and the policing of the system became one of the heaviest tasks of the Department of Justice throughout the war. Suspects were taken into custody without publicity and without trial of any kind. No attempt was made at wholesale internment. By May 6, only one hundred and twenty-five had been arrested, two hundred and ninety-five by the end of June, and eight hundred and ninety-five by the end of October. This number, of course, represented only a very small portion of the enemy aliens in the United States. The others went about their business.<sup>11</sup>

On May 18, 1917, the draft measure to raise an army became a law, and a presidential proclamation was issued designating June 5

<sup>10</sup> Warren to Sec. State, Mar. 29, 1917, D. J. File 9-16, Sec. 3; Ann. Rep. Atty. Gen. 1917, 56, 59; Cong. Rec., 65 Cong. 1 Sess., 102-104, 214; 40 Stat. 1 and 1650, April 6, 1917; Warren, Memorandum to Atty. Gen., April 6, 1917, D. J. File 9-16, Sec. 1; Circular Bk. No. 5, 30.

<sup>11</sup> Polk to Atty. Gen., April 9, 1917, D. J. File 9-16, Sec. 1; see correspondence in D. J. File 9-16-4; Ann. Rep. Atty. Gen. 1917, 56, 63; see correspondence in D. J. File 9-16-12; undated statement prepared for signature of Atty. Gen., D. J. File 9-16, Sec. 1, published in the *New York Times*, May 7, 1917.

for the registration of all males between the ages of twenty-one and thirty inclusive. The machinery of enrollment was in the hands of the War Department, but there was considerable apprehension of refusals to register and of disorders in connection with registration. The Department of Justice prepared to aid. On May 28 the Attorney General warned against efforts to discourage registration, and on the following day twenty-five arrests were announced. In Texas and in the mountains of Virginia, organizations were said to be arming themselves to resist. "There are indications that attempts will be made in one or two of the Central Western cities to make registration ineffective," Gregory warned. "The Department is prepared to care for such emergencies." A circular of instructions was sent to district attorneys and marshals.<sup>13</sup>

Two boys from Columbia University and a girl from Barnard College were arrested for agitating to prevent registration. Bail for each was fixed at fifteen hundred dollars. The Attorney General issued a further warning that "certain disloyal citizens" not of conscription age were urging men to go to prison rather than serve in the army. He pointed out that those apprehended would not escape with mere confinement but would be required to perform military service as well. He predicted that in every community some would attempt to evade registration. "One class will consist of weaklings who lack the physical and moral courage necessary to face the possibility of a fight, and another of those under the influence of men and women beyond the conscription age who are endeavoring to dissuade young men from registering," he declared. "Some of the people exerting this influence are wholly disloyal; others are lacking in patriotism or an appreciation of the needs of their country and are animated by the fear of the possible loss of members of their families." Evasions would be promptly prosecuted.<sup>14</sup>

Registration took place effectively and with little violence. When a subsequent check indicated that several thousand had failed to enroll themselves, Gregory ordered a sweeping investigation. Prosecutions were instituted, but the Department of Justice was disposed

<sup>13</sup> 40 Stat. 76 and 1664, May 18, 1917; *Official Bulletin*, May 28, 1917; *New York Times*, May 29 and 30, 1917.

<sup>14</sup> *Id.*, June 1, 1917; *Official Bulletin*, June 2 and 4, 1917.

to be lenient toward those willing to register after apprehension, "believing that it was more important to get the eligibles into the Army than to confine them in jail."<sup>14</sup>

There was legislation to be drafted, including a joint resolution for taking over German ships and an act permitting the Allies to recruit their nationals in the United States. Before the special session of Congress assembled, Warren redrafted his omnibus bill to include provisions recommended by the department but omitted by the Senate. The measure, known thereafter as the Espionage Act although it included a variety of provisions, became law on June 15, 1917.<sup>15</sup>

Private organizations with hundreds of thousands of members were set up to investigate and report disloyal acts and utterances. "Complaints of even the most informal or confidential nature are always welcome," Gregory announced to the district attorneys. "Citizens should feel free to bring their information or suspicions to the attention of the nearest representative of the Department of Justice." Inevitably, there were serious abuses. "No other one cause contributed so much to the oppression of innocent men as the systematic and indiscriminate agitation against what was claimed to be an all-pervasive system of German espionage," said the chief of the war work unit of the Department of Justice later. "One unpleasant fact continually impressed on my associates and myself was the insistent desire of a very large number of highly intelligent men and women to become arms of the Secret Service and to devote their entire time to the patriotic purpose of pursuing spies." As many as a thousand letters a day reached the department, calling attention to individuals or acts thought to be seditious. At least ninety-five per cent of them turned out to be of no importance.<sup>16</sup>

In the summer of 1917 the Industrial Workers of the World, sus-

<sup>14</sup> *Id.*, July 30, 1917; Ann. Rep. Atty. Gen. 1917, 74.

<sup>15</sup> 40 Stat. 75, May 12, 1917; *id.*, 39, May 7, 1917; Warren to Atty. Gen., Mar. 30, 1917, D. J. File 9-4, Sec. 3; see notations on letters to Flood and others, Mar. 30, 1917, *ibid.*; 40 Stat. 217, June 15, 1917; Warren, Memorandum for O'Brien, April 3, 1918, D. J. File 9-19, Sec. 2; Warren to Scott, July 2, 1917, D. J. File 9-4, Sec. 4.

<sup>16</sup> O'Brien, *Civil Liberty in War Time*, 65 Cong. 3 Sess., Sen. Doc. No. 434, 5; New York Times, May 13, 1917; Gregory to Manning, Dec. 20, 1917, D. J. File 9-19, Subsection A.

pected of sabotage from Chicago westward with financial support from enemy sources, was quietly investigated by district attorneys and special agents. On September 5, simultaneously in Chicago and in the principal cities on the west coast, I. W. W. headquarters were raided and papers seized. The Chicago raid covered the National Socialist party headquarters as well. William D. Haywood, I. W. W. leader, and others were placed under arrest. The President and the Attorney General were determined upon prosecution. The sentences imposed at Chicago, Sacramento, and Wichita were heavy.<sup>17</sup>

The Department of Justice had some three hundred investigators scattered throughout the country when the war began and had added another hundred by the following June. In addition, it relied heavily upon the services of a volunteer organization known as the American Protective League, which had been organized early in 1917, with the approval of the Attorney General, for informal assistance in gathering evidence of neutrality violations. It spread rapidly. By the middle of June it had branches in almost six hundred cities and towns and a membership of nearly one hundred thousand. In 1918 the membership ran to some two hundred and fifty thousand. It performed varied services for the government. In addition to reporting pertinent information of value which came to its attention, the American Protective League made thousands of investigations regarding registrations, the antecedents and loyalty of civil employees and applicants for commissions in the Reserve Corps, and the loyalty and history of all persons whom the American Red Cross contemplated sending abroad.<sup>18</sup>

Secretary of the Treasury McAdoo proposed to the President the creation of a Bureau of Intelligence in the Department of State to coordinate the war work of the Secret Service, the Bureau of Investi-

<sup>17</sup> Gregory to Warren, July 11, 1917, D. J. File 186701, Sec. 1; Warren to Bielaski, July 12, 1917, *ibid.*; Gregory to Warren, July 16, 1917, *ibid.*; Circular, July 17, 1917, *ibid.*; New York Times, Sept. 6, 1917; Haywood v. U. S., 268 Fed. 795 (1920); Ann. Rep. Atty. Gen. 1917, 76; Wilson to Gregory, April 3, 1918, D. J. File 186701, Sec. 2; O'Brian, Memorandum for Atty. Gen., April 30, 1919, D. J. File 186701, Sec. 1.

<sup>18</sup> Gregory to McAdoo, June 12, 1917, D. J. File 44-03-2, Sec. 1; Hough, *The Web* (1921), 29, 36; Ann. Rep. Atty. Gen. 1918, 15; Johnson to Gregory, June 25, 1917, D. J. File 186751, Sec. 1; Graham to Walker, Oct. 5, 1917, *ibid.*; Gregory to President, American Protective League, Mar. 22, 1918, *ibid.*; O'Brian to Dockery, April 5, 1918, *ibid.*

gation of the Department of Justice, and the Postal Inspection Service. Gregory wrote President Wilson a pointed reply. He quoted statutes and declared that there had been no confusion except as the Secret Service had encroached upon the prerogatives of the Bureau of Investigation.<sup>19</sup> McAdoo sent to Gregory a four-page letter in which he regretted that he could not reply "at length" concerning the inaccuracies in Gregory's letter. He criticized the American Protective League and its badge and identification card bearing the words "Secret Service Division" which naturally led to confusion with the Secret Service of the Treasury Department.

"For 75 cents or \$1.00," he wrote, "membership may be obtained in this volunteer organization and authority conferred, with the approval of the Department of Justice, to make investigations under the title of 'Secret Service.'" He insisted that the badges and cards be destroyed. "You will recall," he said in closing, "that during the American Revolution a voluntary organization similar in character, I imagine, to the one in question was formed under the title of 'Sons of Liberty.' It committed grave abuses and injustices. This 'Secret Service' division of the American Protective League contains the same evil potentialities, especially since it is operating under the sanction of the Department of Justice. I am, of course, not advised as to whether or not there is authority of law for such sanction on your part."<sup>20</sup>

Gregory replied with a long defense of the League. Doubting that there was danger of confusion with the Secret Service, he nevertheless arranged that its literature and badges should be changed but declared that nothing could be done about the badges already in private possession. He proposed a new badge stating that the league was "cooperating with" the Department of Justice. League members thought this too weak and a denial of proper recognition. After several months, "Auxiliary to the U. S. Department of Justice" was adopted.<sup>21</sup>

<sup>19</sup> Ann. Rep. Atty. Gen. 1917, 59; McAdoo to Wilson, April 16, 1917, D. J. File 44-03-2, Sec. 1; Gregory to Wilson, April 17, 1917, *ibid.*; see O'Brian to Cooksey, Mar. 23, 1918, D. J. File 44-03-2, Sec. 2.

<sup>20</sup> McAdoo to Gregory, June 2, 1917, *ibid.*

<sup>21</sup> Gregory to McAdoo, June 12, 1917, *ibid.*; Briggs to Gregory, May 24, 1918, D. J. File 186751, Sec. 1; O'Brian to American Protective League, May 27, 1918, *ibid.*

There was little contemplation of wholesale confiscation of enemy property such as loyalists had desired during the Civil War. Until its enactment on October 6, 1917, Warren was concerned with drafting and advocating the Trading with the Enemy Act, which created the office of Alien Property Custodian. The custodian was empowered to seize property in the United States owned by non-resident enemy aliens, not for the purpose of permanent confiscation but to hold and use it for the government during the period of the war.<sup>22</sup>

The department quite naturally had no division organized for the handling of wartime activities. The work, at first dispersed among such men as seemed most competent to do it, was gradually brought together under Charles M. Storey, who was directly responsible to Assistant Attorney General Warren. As duties increased it developed into what became known as the War Emergency Division. The position of Special Assistant to the Attorney General for War Work was conferred on John Lord O'Brian, a Republican from Buffalo, New York. He had been district attorney during the Taft administration and for a time had remained in that post during the Wilson administration. The Department of Justice had come to know him better in connection with the prosecution of von Rintelen, a notorious German agent. In his new position, he built up a staff to handle the increased responsibilities growing out of the declaration of war with Austria-Hungary, the registration of all enemy aliens in the country, and the prosecution of sabotage, sedition, and other offenses.<sup>23</sup>

For good morale in the department as a whole, Attorney General Gregory was responsible. Not spectacular, he acted with force when necessary. He was established in the confidence of the President, who spoke of him as one loved and trusted.<sup>24</sup> They were in frequent informal conference either at the White House or by telephone. He kept in supervisory touch with all the work of his department, freely delegating responsibility to his assistants.

<sup>22</sup> 40 Stat. 411, Oct. 6, 1917; Gregory to Todd, Sept. 29, 1917, D. J. File 9-17, Sec. 2.

<sup>23</sup> Memorandum for the Files, June 21, 1919, D. J. File 200485; *U. S. v. Rintelen*, 233 Fed. 793 (1916); Gregory to Sargent, May 5, 1927, D. J. File 200485; Ann. Rep. Atty. Gen. 1918, 687, 702.

<sup>24</sup> Wilson to House, July 23, 1916, *New York Times*, Jan. 16, 1936.

The problems were unique. His circular of December 24, 1917, urged all the officers and employees not to desert the department for more remunerative positions in private employment. "I know of no more unpatriotic thing than for a citizen of the United States to capitalize and make money out of the present situation," he declared. "Every efficient employee of the government who leaves its services and goes into that of a private individual weakens to that extent the power of the government under existing conditions." He adopted as a part of his own a circular of the Secretary of Commerce which advised the cultivation of the doctrine of the clean desk. "It helps the Kaiser to have matters lie over night without attention," it read. "Delay now is a German act. Don't delay!" \*\*

Since the Department of Justice was the focal point of the hates and fears of thousands of people who were reporting old friends and neighbors as well as strangers for offenses against the nation and demanding punishment to the limit of the law, it is not an occasion for surprise that taut nerves were revealed in such petty matters as strife between the Bureau of Investigation and the Secret Service. Only good fortune or good generalship prevented emotional outbursts of a more serious character.

One explosion which in calmer times might have been averted took place when Charles Warren forcefully advocated courts martial as a means of summary punishment for civilian offenders, in spite of the fact that in the inner circles of the government it was known that the President and the Attorney General were firmly opposed to military justice. Warren prepared a brief in support of his position. This and a draft of a bill he sent to influential Senators, and the suggestions were advocated before the Senate Military Affairs Committee. On hearing of these developments, Gregory denounced the proposals as "subversive of fundamental principles of justice." \*\*

There developed no widespread feeling, as had occurred during the Civil War, that the courts themselves prevented convictions, though much the same impatience with established legal procedure

\*\* Circular, Dec. 24, 1917, D. J. File 200485.

\*\* New York Times, April 23, 1918; Gregory to Warren, April 18, 1918, D. J. File 190470, Sec. 17; O'Brian, memorandum, Feb. 9, 1918, Warren, memorandum, Feb. 16, 1918, and additional memorandum in D. J. File 44-4-4, Sec. 1; Gregory to Gordon, April 20, 1918, D. J. File 190470, Sec. 5.

appeared. Rumors of ineffective civil prosecutions and of the release of spies and criminals were circulated. The Department of Justice sought to answer the criticisms by publishing data on prosecutions. For the year ending in April 1918 it was disclosed that of the nine hundred and eighty-one persons tried for violation of the Selective Service Act only seventeen had been acquitted; of the one hundred and eighty tried prior to January 1 for violations of the Espionage Act, only six were acquitted; and of one hundred and twenty tried for conspiracies under the war statutes, only seven were acquitted. In defense of orderly civil procedure, readers were reminded that this was a "country of laws and not of men." Gregory opposed the court martial bill; and doubts as to its constitutionality and wisdom stood as a barrier in Congress, where the application of the *Milligan* case, decided in terms of the Civil War military tribunals, was recognized.<sup>11</sup>

Hostile though he was to military rule, Gregory desired legislation of other kinds. He publicly announced his support of a bill to punish sabotage, a passport bill, and an amendment to the Espionage Act which would make possible more effective suppression of seditious utterances. The sabotage and passport acts were adopted much as drafted by the department. Gregory characterized the former as "the most important and sweeping of all war statutes relating to hostile or anti-war activities." It was a response to the thousands of reports of attempts at destruction of property intended for use in the war. The number of prosecutions, however, was small.<sup>12</sup>

He regarded the amendment to the Espionage Act, known generally as the Sedition Act, as the final link in a chain of measures necessary for dealing with disloyal utterances and acts. It provided drastic punishment for making false statements to interfere with military operations or obstruct the sale of United States bonds; inciting disloyalty or mutiny in military forces; obstructing enlistments; abusing the Constitution, the government, the flag, or the

<sup>11</sup> *Official Bulletin*, April 19, 1918; Cong. Rec., 65 Cong. 2 Sess., 5401-5402, 5471-5472.

<sup>12</sup> *New York Times*, July 31, 1917; Gregory, *Suggestions of Attorney General Gregory to Executive Committee in Relation to the Department of Justice* (1918), 4 A.B.A.J. 305; 40 Stat. 533, April 20, 1918, and see D. J. File 184886; 40 Stat. 559, May 22, 1918; *New York Times*, April 25, 1918; Ann. Rep. Atty. Gen. 1919, 24-25.



military establishment; provoking resistance to the United States; or in any way talking or writing in support of the cause of the enemy. Such a statute was a dangerous weapon in the hands of vindictive or fanatical prosecutors. The difficulty of administration, as phrased by O'Brian, was that it covered all degrees of conduct and speech, serious and trifling alike, "and, in the popular mind, gave the dignity of treason to what were often neighborhood quarrels or barroom brawls." The Department of Justice recognized the possibilities of abuse. "It should not be permitted to become the medium whereby efforts are made to suppress honest, legitimate criticism of the administration or discussion of Government policies; nor should it be permitted to become a medium for personal feuds or persecution," read instructions to district attorneys. "Protection of loyal persons from unjust suspicion and prosecution is quite as important as the suppression of actual disloyalty." The volume of prosecutions for all sorts of utterances became so great that in October 1918 a circular was issued directing that no more sedition cases be presented to grand juries until the facts had been submitted to the Department of Justice. This checked the stream of charges, but it was discovered months later that in some districts prosecutions had continued without preliminary reports to the department.\*\*

A series of "slacker" raids throughout the country led to much unfavorable publicity. The New York *Evening World*, in an editorial entitled "Department of Injustice," demanded an inquiry, saying it had "steadily resented the incessant aspersions cast upon our community by perfervid females and members of Amateur Patriots' Associations that it was a draft-dodging, unpatriotic town." The President asked for the facts and circumstances. Gregory took upon himself full responsibility for the dragnet process as the only effective method. "Contrary to my express instructions, however," he explained, "instructions which I have repeated over and over again, and contrary to law, certain members of the investigating force of this Department, without consultation with me or with any law

\*\* 40 Stat. 553, May 16, 1918; Gregory to Hicks, June 3, 1918, D. J. File 9-19, Subsection A; O'Brian, *Civil Liberty in War Time*, *op. cit.*, 16-18; Ann. Rep. Atty. Gen. 1918, 674; Mooney to Atty. Gen., Oct. 11, 1920, Robertson to Atty. Gen., Oct. 14, 1920, Lucey to Atty. Gen., Oct. 23, 1920, D. J. File 9-19, Sec. 2.

officer of the Department, used soldiers and sailors and certain members of the American Protective League, I am satisfied, in making arrests." \*\*

The Department of Justice had a gigantic task in policing enemy aliens who were under suspicion as a class but not accused of crime. Those guilty of disloyal conduct were subject to internment, but beyond that, so long as they obeyed regulations, they were unrestricted. For the purpose of effective supervision, it became necessary to require all German alien males of fourteen years of age and over to register, submit to fingerprinting, and carry registration cards. Approximately 480,000 Germans were registered, and it was estimated that the Austro-Hungarian population was more than 3,500,000. Yet the total of arrests under presidential warrant was only about 6,300. Of these some 2,300 were turned over to military authorities for internment, a few were released, and the remainder placed on parole.<sup>81</sup> Until the enactment of the sedition statute the department was hampered in its efforts to deal with naturalized persons of enemy-country origin charged with disloyal utterances, whose citizenship became a cloak for such conduct. The situation was met in part by civil actions to cancel certificates of citizenship, relying upon wartime misconduct as evidence of fraud in the renunciation of allegiance to enemy countries. The successful outcome of early cases had a marked effect in restraining overt disloyalty on the part of other persons in the same class.<sup>82</sup>

Many changes of personnel took place during the months immediately following the armistice. Gregory tendered his resignation, effective March 3, 1919, to return to private practice. His place was taken by A. Mitchell Palmer, the Alien Property Custodian. O'Brien completed or transferred to other officers of the department the

<sup>80</sup> Bielaski, Memorandum to Atty. Gen., Sept. 9, 1918, D. J. File 195176, Sec. 1; New York *Evening World*, Sept. 6, 1917; Wilson to Gregory, Sept. 5, 1918, D. J. File 195176, Sec. 1; Gregory to Wilson, Sept. 9, 1917, *ibid.*; see Hayward to Gregory, Nov. 6, 1922, *id.*, Sec. 2.

<sup>81</sup> Ann. Rep. Atty. Gen. 1918, 26, 687, 702, 740; *id.*, 1919, 25; Circular, Dec. 17, 1917, Circular Bk. No. 5, 80; 40 Stat. 1716, Nov. 16, 1917; Warren, Memorandum to O'Brien, Nov. 12, 1917, D. J. File 9-16-19, Sec. 1; Gregory, *Suggestions of Attorney General Gregory to Executive Committee in Relation to the Department of Justice, op. cit.*, 307-308; 40 Stat. 531, April 16, 1918; Gregory to Wilson, Dec. 14, 1918, D. J. File 9-16-12, Sec. 17; Gregory to Wilson, Dec. 21, 1918, *ibid.*; Tumulty to Gregory, Dec. 23, 1918, *ibid.*; Circular, April 3, 1919, *id.*, Sec. 18.

<sup>82</sup> Ann. Rep. Atty. Gen. 1918, 39; *id.*, 1919, 25-26.

work of the War Emergency Division. A few days after the armistice, Gregory had asked the American Protective League to continue vigilant. Some weeks later, on February 1, 1919, because the continuation of a private organization in an official relation to the Department of Justice might lead others to claim recognition, the League was asked to disband. Letters of praise and appreciation were sent to Congress and to the officers and members of the League. Local divisions, however, announced their intention to continue their existence. The Cleveland unit wrote of reorganization as the Loyal American League and announced opposition to "any relaxation of the policy of the Government against seditious acts, or words, whether aimed at the prosecution of war or at the re-establishment of social industrial order in the new peace." "

In April and May 1919 newspapers blazed with headlines concerning bombs sent to prominent persons throughout the country. Most of the explosives were intercepted in the mails. A riot in Cleveland, precipitated by the conviction of Eugene V. Debs for violation of the Espionage Act, added to the prevailing feeling of uneasiness. On June 3, 1919, came the exciting news that on the preceding night a bomb being carried up the steps had exploded prematurely at the door of the house of Attorney General Palmer. His home was damaged. His assailant had been blown to bits. Parts of the body landed across the street on the steps of the house of Assistant Secretary of the Navy Franklin D. Roosevelt, who had entered his home three minutes earlier in time to hear and feel the explosion which shattered all windows in the neighborhood. He hurried over to see whether the Palmers had been injured."

Acts of violence occurred at the same time in other cities. "I

" O'Brian, War Emergency Division, May 28, 1919, D. J. File 200485; Gregory to National Directors, A. P. L., Nov. 15, 1918, D. J. File 186751, Sec. 2; O'Brian to Yates, Mar. 6, 1919, *ibid.*; Gregory to Gard, Jan. 31, 1919 and Gregory to the National Directors and All Officers and Members of the American Protective League, Feb. 1, 1919, *ibid.*; Loyal American League to Palmer, Mar. 17, 1919, *ibid.*; O'Brian to Loyal American League, Mar. 22, 1919, *ibid.*; O'Brian to Wertz, Mar. 22, 1919, *ibid.*; O'Brian to Loyal American League, April 1, 1919, *ibid.*; New York Times, April 1, 1919.

Alexander Mitchell Palmer (1870-1936) was born at Moosehead, Pennsylvania, served three terms as a member of Congress, then became Attorney General (1919-1921). He returned to private practice in Stroudsburg, Pennsylvania, and in Washington, D. C. Nat. Cyc. of Am. Biog., Current Volume A, 44.

"<sup>4</sup> *Id.*, May 3, 1919.

was shouted at," said Palmer later, "from every editorial sanctum in America from sea to sea; I was preached upon from every pulpit; I was urged—I could feel it dinned into my ears—throughout the country to do something and do it now, and do it quick, and do it in a way that would bring results to stop this sort of thing in the United States." He summoned William J. Flynn, former head of the Secret Service of the Treasury, to take charge of the Bureau of Investigation and ferret out anarchist plots. "The purposes of the Department of Justice are the same today as yesterday," Palmer warned. "These attacks by bomb throwers will only increase and extend the activities of our crime-detecting forces." "

The War Emergency Division had been dissolved. A new unit, called the General Intelligence Division, was created to investigate radical activities. Within three and a half months it gathered and indexed the histories of over sixty thousand persons, and it received many complaints regarding prominent teachers or writers. It maintained a force of forty translators and assistants who read nearly five hundred foreign language newspapers published in the United States and abroad, to keep a check on radical propaganda. Before long two hundred thousand names were in the suspect indexes. A few days after his house was bombed, Palmer appeared before a congressional committee to advocate legislation for the suppression of sedition in time of peace. Seventy bills were pending in Congress five months later. However, none of the measures passed."

Nevertheless, with much enthusiastic approval, the agents of the Department of Justice, in a series of dramatic raids, took more than five thousand persons into custody. American citizens were surrendered, sometimes to be dealt with by state and local authorities; aliens were turned over to the Bureau of Immigration for deportation. Palmer's plans met with some discouragement when the Labor

"*Charges of Illegal Practices of the Department of Justice*, Sen. Jud. Subcomm. Hearings, 66 Cong. 3 Sess., 580; *New York Times*, June 3, 1919.

"*Investigation Activities of the Department of Justice*, Sen. Doc. 153, 66 Cong. 1 Sess., 5, 8, 10-12, 14; Palmer, Memorandum to Stewart, July 25, 1919, D. J. File 202600, Sec. 1; *New York Times*, Jan. 4, 1920. A *Digested History of the Federal Bureau of Investigation* (mimeographed document of the bureau, 1935), states that the "General Intelligence Division" was organized in 1919 "under direct administrative supervision of J. Edgar Hoover, since 1917 in charge of counter-radical activities as Special Assistant to the Attorney General"; see other items for 1919 and 1920, *ibid.*

Department failed to cooperate in wholesale deportations on what it regarded as flimsy evidence. Warrants to the number of some five thousand had been issued on assurance that the aliens in question were participants in a gigantic conspiracy to overthrow the government. As the records were referred to Assistant Secretary of Labor Louis F. Post for deportation authorizations, he began to doubt wholesale participation in any such conspiracy. He investigated, and in March and April ordered the cancellation of hundreds of warrants."

Palmer was bitter in his criticism of Post's decisions. "By his self-willed and autocratic substitution of his mistaken personal viewpoint for the obligation of public law, by his habitually tender solicitude for social revolution and perverted sympathy for the criminal anarchists of the country, he has consistently deprived the people of the enforcement of a law of vital importance to their peace and safety," declared the Attorney General. "By his wholesale jail deliveries and his release of even self-confessed anarchists of the worst type, he has utterly nullified the purpose of the Congress in passing the deportation statute and has set at large among the people the very public enemies whom it was the desire and intention of the Congress to be rid of."

Sentiment in favor of the anti-radical movement was so strong that a House committee held hearings as to the advisability of impeaching Assistant Secretary Post. The year passed, however, without serious disturbances save for a deadly bombing in Wall Street, New York, in September. The presidential election of 1920 absorbed attention. Congressional committees were left to hold a post-mortem on the anti-radical crusade. Upon his appointment in 1924, Attorney General Stone directed that all investigators or agents of the Department of Justice confine their activities strictly to matters under existing laws. "It is, of course, to be remembered that the activities of Communists and other ultra-radicals have not up to the present time constituted a violation of the federal statutes," the Acting Director of the Bureau of Investigation, formerly in

"Post, *The Deportations Delirium of Nineteen-Twenty* (1923), 24-27, 78-79, 167-168, 233; *New York Times*, Jan. 1, 3, 4, 23, 24, 26, 29, 1920.

immediate charge of counter-radical activities, acknowledged, "and consequently, the Department of Justice, theoretically, has no right to investigate such activities as there has been no violation of the federal laws." \*\*

\*\* *New York Times*, April 30, May 11, June 3, Sept. 17, 1920; *Charges of Illegal Practices of the Department of Justice*, *op. cit.*, 382; Cong. Rec., 67 Cong. 4 Sess., 3015 *et seq.*; see Ch. XVIII, nn. 66 and 67; Hoover, Memorandum to Donovan, Oct. 18, 1924, D. J. File 202600, Sec. 5.

## CHAPTER XXI

### LABOR AND THE LAW

THE heterogeneous labor problems of the government of the United States, like so many industrial matters, extend back to the Civil War. A statute of 1868 provided that eight hours should constitute a day's work for government laborers. Nothing was said about wages. Some federal officials reduced wages also, to accord with reduced hours. Employees of the government printing office, although not affected by any order then issued, protested to President Johnson. The Workingmen's Assembly of the District of Columbia made a similar protest, asking either the rescission of an order of Secretary of War Schofield or an opinion of the Attorney General on the interpretation of the act. The President referred the matter to Attorney General Evarts.<sup>1</sup>

Secretary of the Navy Welles asked the Attorney General for an opinion on the same subject. An earlier statute provided that navy yard employees should receive approximately the same wages as employees of private establishments in the same vicinity, but it said nothing about equality of hours. The Secretary could conceive that the two laws taken together might mean that navy yard employees should receive as much for an eight-hour day as persons in private employment received for longer hours, but he was inclined to think otherwise. Indeed, the law had been passed at a time when the government program was one of retrenchment.<sup>2</sup>

The 1868 statute, said Evarts, did not absolutely require that government laborers should receive for an eight-hour day the same wages as private employees working longer, but simply meant that the same worth of labor should receive the same compensation in public as in private employment. The theory behind the act, he declared, was

<sup>1</sup> 15 Stat. 77, June 25, 1868; 12 Op. 530.

<sup>2</sup> 12 Stat. 587, July 16, 1862; Welles to Evarts, Sept. 28, 1868, A. G. Ms.

that men working steadily for eight hours would do as much as other men working a longer day, and should be compensated accordingly. "Whatever difficulty there may be in applying this rule is intrinsic in the subject," he concluded, "and can only be met by experience." \*

Some department heads either interpreted the Evarts opinion as allowing the reduction of wages along with hours or chose to disregard it. Because of protests from labor, President Grant's Secretary of the Navy asked Attorney General Hoar for an opinion. Hoar responded in much the same fashion as Evarts. The President directed that wages should not be lowered with the reduction of hours. Even this presidential order, it was said, was disregarded by some officials. Another order was issued, and Congress appropriated funds to pay wages improperly withheld.<sup>4</sup>

An entirely different type of labor problem arose from the presence of large numbers of Chinese laborers in the West. They toiled at building railroads, and they performed other menial labor at low rates of pay at a time when white labor was scarce.<sup>5</sup> Their effective competition in the labor market brought upon them the hostility of white laborers. In California the Chinese were subjected to antagonistic state and local legislation. Western agitation became sufficiently powerful to secure the adoption of the treaty of 1880, permitting the suspension of the immigration of Chinese laborers.<sup>6</sup>

These and subsequent measures provided endless difficulties for the Department of Justice. When asked for an official opinion whether federal law prohibited the transportation of Chinese laborers across the United States in going from one country to another, Attorney General Brewster held in the affirmative. He was asked to reconsider his opinion. He reversed it. Attorney General Garland later concurred in the first Brewster opinion. Solicitor General Chapman in the Harrison administration supported Brewster's second opinion. This opinion was thereafter generally followed.<sup>7</sup>

\* 12 Op. 530.

<sup>4</sup> 13 Op. 29; Cahill, *Shorter Hours* (1932), 69-70. See also 13 Op. 424, 14 Op. 37; *U. S. v. Martin*, 94 U. S. 400 (1876).

<sup>5</sup> See Coolidge, *Chinese Immigration* (1909).

<sup>6</sup> 22 Stat. 826, Nov. 17, 1880, and see *id.*, 58, May 6, 1882.

<sup>7</sup> 17 Op. 416; *id.*, 483; 18 Op. 388; 19 Op. 369. On March 11, 1859, Attorney General Black ruled that the transportation of Chinese coolie laborers to Cuba in American ships did not violate the slave trade acts, 9 Op. 282.



The federal statute did not provide for the deportation of Chinese who had lawfully entered the United States, nor did it banish them if they chose to visit their homeland. In order, therefore, to prevent the entrance of hordes of aliens who had not hitherto touched American soil but were willing to perjure themselves and testify that they were returning after temporary absence, a system of identification was devised. Chinese were required to obtain certificates of legal residence before departure and to present them on their return.<sup>\*</sup> But immigrants from China proved so ingenious in evading the statutes that both Treasury and Justice Department officials over a long period of years found it hard to cope with their clever devices.

The task was not merely one of stopping direct immigration from China, but of damming the streams which flowed through Canada and Mexico into the United States. Chinese were permitted to land in British Columbia on the payment of fifty dollars. Thereafter they made their way toward the border of the United States and were frequently smuggled across. Congress allotted funds for the return to China of those illegally in the country. Attorney General Miller wrote an opinion to the effect that the statute applied to Chinese coming from other countries as well as directly from China, but some judges, much to the Attorney General's irritation, held that Chinese coming from countries in which they had established residence should be returned not to China but to the last country through which they had passed.<sup>\*</sup>

"To arrest and try such persons and, as the result, simply send them back across the British line," reported Attorney General Miller, "is shown to be an idle expenditure of time, labor, and money." It was uncertain whether an order requiring Chinese prisoners to be sent back into the British dominions could be made effective. In one case, the British Columbia authorities refused to permit two Chinese to be returned across the border except upon the payment of a \$50 head tax for each. This the United States marshal refused to pay.

<sup>\*</sup> See 23 Stat. 115, July 5 1884, 25 Stat. 504 Oct. 1 1888, 27 Stat. 25 May 5, 1892, 28 Stat. 7, Nov. 3 1893.

<sup>\*</sup> 20 Op. 171, Miller to Shepard Sept. 29 1891, Instr. Bk. No. 16, 61. Shepard to Miller, Oct. 1 1891 D. J. File 980-1884. Miller to Alexander, Oct. 3, 1891, Instr. Bk. No. 16, 150.

"These persons we now have on our hands," Miller told Congress, "and have no way of disposing of them according to law."<sup>10</sup>

Smuggling Chinese into the country became a profitable business. It sometimes assumed the proportions of large-scale enterprise. For example, there were two steamships owned by a company in Portland, Oregon, ostensibly engaged in legitimate trade but actually in the business of smuggling opium and Chinese laborers. The ships had hidden compartments and double decks artfully contrived for such purposes. The managers of the company, several lawyers, the collector of customs at Portland, a special agent of the Treasury and others carried on this illegal business without serious interruption or interference. They had succeeded, Attorney General Harmon reported, "in debauching or deceiving various agents sent out to investigate." In 1893, special agents of the Treasury disclosed the frauds. The corrupt federal officials were at once ousted and, with a large number of their associates, indicted for conspiracy to violate the laws of the United States. The leaders were convicted. One of the ships was confiscated, the other escaped confiscation only through destruction by fire.<sup>11</sup>

The enforcement of Chinese exclusion laws continued for many years to vex the Justice and Treasury Departments and the newly organized Department of Commerce and Labor as well. The problem eventually was merged with the broader task of restricting immigration from all parts of the world.

Beginning with 1885 the Department of Justice undertook extensive responsibilities in the enforcement of a statute prohibiting the importation of contract labor. The Knights of Labor was a powerful American organization of both skilled and unskilled labor, a branch of which was the window glass workers' association. When employers imported alien glass blowers, the Knights of Labor proposed legislation intended to exclude skilled as well as unskilled contract labor.<sup>12</sup> After a great deal of agitation, an act was passed in 1885 against the importation of contract labor believed to be imported by

<sup>10</sup> Ann. Rep. Atty. Gen. 1891, 15-16.

<sup>11</sup> *Id.*, 1895, 20.

<sup>12</sup> See Powderly to Hughes, Dec. 18, 1899, Powderly to Hughes, Dec. 21, 1899, the Powderly memorandum, and Gage to Griggs, Jan. 10, 1901, D. J. File 5053-1885.

avaricious employers callous of the effect on the American standard of living.<sup>13</sup>

The Knights of Labor was determined to see that the new legislation was enforced. It spent large sums investigating alleged violations, presented the evidence to district attorneys, and deluged the Attorney General with requests for speedy and vigorous prosecutions. When district attorneys became lax or arranged compromises at low figures, the Knights of Labor poured hot protests upon the Attorney General and the President, accompanied by thinly veiled threats of political reprisals.<sup>14</sup> The protests continued through the late 1880's and ceased only with the disintegration of the organization.

Imperfect drafting of the act eventually led to interpretation against the interests of labor. Professional actors, artists, lecturers, and singers were exempted from its provisions. Nothing was said about clergymen or university professors. The Church of the Holy Trinity in New York, importing a minister under contract, was held by a lower federal court to have violated the law. An amendment was passed in 1891, exempting clergymen and teachers, but it left untouched the case of the Church of the Holy Trinity then pending on appeal. The Supreme Court looked to the background of the legislation as revealed in the *Congressional Record*, saw the emphasis in debate upon unskilled workmen, and held that the original act did not apply to the professional classes.<sup>15</sup>

Relying upon the reasoning and the language of the Supreme Court, a federal circuit court in another case decided that the act did not apply to a person imported as a draper, window dresser, and dry goods clerk. This was affirmed by a circuit court of appeals. "It would be absurd," declared Judge Bunn, "to suppose that Congress intended that persons employed in trade, or in any business requiring intelligence and skill, or, indeed, any except those from the lowest social stratum engaged in unintelligent and uncultivated labor,

<sup>13</sup> 23 Stat. 332, Feb. 26, 1885; Cong. Rec., 48 Cong. 1 Sess., 5358 *et seq.*, 6059-6060.

<sup>14</sup> See D. J. File 5053-1885 including letters concerning the *Northfield Knife Company* case beginning with R. Beaumont to Garland, Dec. 21, 1887.

<sup>15</sup> *U. S. v. Church of the Holy Trinity*, 36 Fed. 303 (1888), *Holy Trinity Church v. U. S.*, 143 U. S. 457 (1892); 26 Stat. 1084, Mar. 3, 1891.

should be sent back to the nations from whence they came." Despite the protests of T. V. Powderly, former presiding officer of the Knights of Labor, the government did not appeal the case further.<sup>16</sup>

These, however, were hardly preliminary skirmishes. The decade of the 1890's was one of labor unrest. An early development was the use of the Sherman Antitrust Act to curb the activities of unions. In New Orleans the draymen went on strike in 1892, and under the direction of the Workingmen's Amalgamated Council a number of other unions followed, effectively tying up business throughout the city. Attorney General Miller directed the district attorney at New Orleans to institute proceedings under the antitrust act, if in his judgment a case could be made.<sup>17</sup> The draymen's union reached a compromise with employers and the strike was terminated. As it was brought to a close, however, the district attorney instituted suit against the Workingmen's Amalgamated and the other unions to prohibit interference with interstate and foreign commerce.

After the termination of the strike, the district attorney asked and secured a continuance of the case while he consulted with the Department of Justice as to future action. The request was granted in spite of the protests of defendants against keeping the threat of injunction hanging over them. Their counsel sent a letter to the Attorney General. "There are those in this community who believe that that cause was not instituted to be tried, but on the contrary to be held *in terrorem* over the heads of the workingmen of this city, with the hope that it would alarm and disintegrate them," they declared. "However this may be, the Government of the United States should not be a party to any such juggling Chinese warfare."<sup>18</sup>

The district attorney hoped to secure an injunction which would prevent future strikes. The Attorney General took the position that if the Workingmen's Amalgamated remained a potential menace to interstate and foreign commerce the injunction ought to be secured,

<sup>16</sup> *U. S. v. Gay*, 95 Fed. 226 (1899); and see the Powderly letters, *supra*, n. 12.

<sup>17</sup> Miller to Earhart, Nov. 8, 1892, Instr. Bk. No. 25, 457.

<sup>18</sup> New Orleans *Times Democrat*, Dec. 17, 1892; Marks and Leonard to Miller, Dec. 17, 1892, D. J. File 8247-1890.

even though the strike which had precipitated the issue was a thing of the past.<sup>19</sup> The injunction was granted three months later. The judge held that the fact that the strike had ended was no ground for staying the hand of the court. "The congressional debates show that the statute had its origins in the evils of massed capital," said Judge Billings. But the act was drawn in general terms and, unlike the method of interpretation in the contract labor cases, he thought it should be applied broadly to include combinations of labor as well as of capital.<sup>20</sup> Workingmen were astounded to learn that the Sherman Act was to be applied to them when it had not yet been enforced against industrial organizations.

Attorneys for lumber importers shortly thereafter asked the district attorney for northern New York for an injunction to prevent interference with business by the Tonawanda Lumber Shovers' Union. The request was referred to Attorney General Olney, who refused to authorize proceedings. It was a matter of public notoriety, declared Olney, that the provisions of the Sherman Act were aimed at public mischief of a wholly different character. Moreover, for the United States to proceed against labor under the antitrust act, he wrote, "puts the whole power of the federal government on one side of a civil controversy, of doubtful merits, between the employers of labor on one hand and the employed on the other." Such a proceeding, he concluded, wore the appearance of unfairness on various grounds. "As strikingly illustrating the perversion of a law from the real purpose of its authors," he reported to Congress, "in one case the combination of laborers known as a 'strike' was held to be within the prohibition of the statute."<sup>21</sup>

The panic of 1893 brought reductions of wages and widespread unemployment. Strikes threatened and in some cases occurred on railroads in the hands of receivers appointed by federal courts. Such roads were technically in the custody of the courts. Olney, a former railroad lawyer, favored broad use of the injunctive power to prevent

<sup>19</sup> Earhart to Miller, Dec. 19, 1892, *ibid.*; Miller to Earhart, Dec. 22, 1892, Instr. Bk. No. 27, 18-19.

<sup>20</sup> *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 994 (1893); affirmed 57 Fed. 85 (1893).

<sup>21</sup> Clinton, Clark & Ingram to Alexander, May 1, 1893, D. J. File 8247-1890; Olney to Alexander, May 12, 1893, *ibid.*; Ann. Rep. Atty. Gen. 1893, 27.

injury to their property and business. He discussed the matter with Justice Harlan and later criticized Justice Harlan's moderate interpretation of the equity powers of the federal courts.<sup>22</sup>

The hard times of the period continued to contribute to general unrest. In many sections groups congregated to march on Washington for the purpose of urging legislation to provide work and wages. The demonstrators were variously known as "Commonwealers" and "Coxey's Army." Partly because of the measures employed by the government, not enough of the marchers reached Washington to cause much disturbance. However, serious disorders developed along the western railroads. James J. Hill of the Great Northern wired President Cleveland that between St. Paul and the Pacific Coast there were from four to five thousand men in parties of from two to six hundred, who intended to move on to the national capital. Hill declared that they were mainly men who would not work for a living. The government, he thought, should prevent them from starting, rather than attempt to deal with them when they arrived at St. Paul or Chicago.<sup>23</sup>

Along the lines of the Union Pacific and Northern Pacific the marchers seized trains to carry them eastward. This interfered not only with interstate commerce and the carrying of the mails but with the efforts of the courts to operate the roads through receivers. "Execute any injunction or other process placed in your hands by a United States Court for the protection of persons and property against lawless violence by employing such numbers of deputies as may be necessary," Olney wired the federal marshals. "If execution is resisted by force which cannot be thus overcome, let judge issuing process wire facts to President with request for military assistance."<sup>24</sup>

Trains seized by the marchers were recaptured with the aid of federal deputies or federal troops. The Attorney General in some cases felt inclined to make examples of the leaders and be lenient toward the lesser participants, but in other instances he became severe. "Important that the entire commonweal army arrested for

<sup>22</sup> James, *op. cit.*, 37; see Olney to Harlan, Aug. 26, 1894, Olney Papers, Lib. Cong.; Olney to Perkins, Oct. 4, 1894, *ibid.*; *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.*, 60 Fed. 803 (1894); *Arthur v. Oakes*, 63 Fed. 310 (1894).

<sup>23</sup> Hill to Cleveland, April 24, 1894, Cleveland Papers, Lib. Cong.

<sup>24</sup> Olney to Bede, April 24, 1894, Instr. Bk. No. 39, 31.

lawlessness at Montpelier should be tried and adequately punished," he wired District Attorney Forney in Idaho. "Unwise to discharge any of them." He was warm in his congratulations when convictions were obtained.\*\*

By the effective use of deputies, by the employment of troops when the force of deputies was inadequate, by prompt and vigorous prosecutions, and by injunctions issued through the federal courts, the movement of commonweal groups and interference with railroads were stopped.\*\*

When soon afterward the Attorney General was faced with the Pullman strike in Chicago, he set out to get the consent of the President again to use injunctions, deputy marshals, and troops.\*\* The strike not only affected the Pullman Company but included also railroad employees who were members of the American Railway Union, of which Eugene V. Debs was president. It represented a struggle between this newly formed industrial union and the General Managers' Association, an organization of the twenty-four railroads running into Chicago which supported the Pullman Company in a controversy over the dismissal of employees and the reduction of wages.

It was the original purpose of the strikers to prevent the movement only of Pullman cars; but since the railroads refused to cut such cars from their trains, few trains were permitted to run. Interstate commerce and the delivery of the mails were blocked. The leaders attempted to conduct the strike without violence, but disturbances occurred in spite of their efforts. Newspapers became excited over the possibility of mob control.

Acting on the advice of the General Managers' Association, Attorney General Olney appointed Edwin Walker, the attorney for one of the roads, as special counsel for the government. Since Uncle Sam was a poor paymaster, Olney wrote, he was to serve "largely from public spirit." Chicago was the center of disturbance. "It has seemed to me that if the rights of the United States were vigorously

\*\* See Olney to Leslie, April 30, 1894, *id.*, 102; Olney to McDermott, April 30, 1894, *id.*, 104; Olney to Sawyer, June 22, 1894, Instr. Bk. No. 40, 426; Olney to Forney, May 19, 1894, Instr. Bk. No. 39, 498; Olney to Perry, May 25, 1894, *id.*, 597; Olney to Forney, June 11, 1894, Instr. Bk. No. 40, 240; Olney to Perry, June 26, 1894, *id.*, 475.

\*\* Ann. Rep. Atty. Gen. 1894, 30-31.

\*\* James, *op. cit.*, 201.

asserted in Chicago, the origin and center of the demonstration, the result would be to make it a failure everywhere else and to prevent its spread over the entire country," he wrote Walker. "In this connection it has seemed to me advisable not merely to rely on warrants against persons actually guilty of the offense of obstructing United States mails, but to go into a court of equity and secure restraining orders which shall have the effect of preventing any attempt to commit the offense." While the marshal and the district attorney requested and were authorized to employ fifty deputies, Olney felt that the true way of dealing with the situation was by overwhelming force which would smother resistance."

Pursuant to the desires of the Attorney General, District Attorney Milchrist drafted a petition for an injunction. The two federal judges, Grosscup and Woods, aided him in revision and then granted the application." In sweeping terms it forbade the major activities of labor connected with the strike, including the persuasion of employees to quit work. In breadth and drastic character it remained unique for years to come.

Having been rolled in the dirt by a mob to which he wished to read the order of the court," Federal Marshal Arnold wired Olney for federal troops. The Attorney General directed the district attorney to forward a statement of facts, to be supported by Walker, the marshal, and the United States judge. The statement was sent, and the President issued an order for the use of troops. There was serious rioting, and the troops, with some thousand or more deputy marshals, attempted to restore order. The arrest of Debs and others deprived the strikers of leadership. The strike was broken and the union virtually destroyed. After arrests for obstructing the mails, contempt proceedings were instituted and successfully carried forward.

Although the heart of the strike was in Chicago, it extended throughout the country. There was official correspondence from thirty-five states. In thirteen states injunctions similar to that issued

" Nevins, *Grover Cleveland* (1932), 616; Olney to Walker, June 30, 1894, Ann. Rep. Atty. Gen. 1896, App. 60.

" Nevins, *op. cit.*, 618.

" *Id.*, 619.



in Chicago were obtained, and others were authorized in at least four states. In three states there were criminal indictments. In California six companies of troops maintained order. So intense was the local feeling, Special Assistant Call reported, that "it was only with the greatest difficulty that an open rebellion was prevented." <sup>11</sup>

Olney and Walker worked zealously in pressing the contempt charges against Debs and his fellows. It was necessary to postpone the case until September. Walker became somewhat reconciled to the postponement because Debs had incurred the hostility of the *Chicago Herald*, and the *Herald* was ferreting out evidence for the prosecution. <sup>12</sup>

In discussing the legal foundations of the injunction, Olney, despite his earlier opinion concerning the strike of the Tonawanda lumber shovers, thought the Sherman Act applied to combinations of labor as well as of capital. This was not vital, however, for he found stronger grounds for the injunction. The government was authorized to protect the mails. Another ground was the obstruction of interstate commerce, or as Olney put it, "the indisputable jurisdiction of a court of equity in the case of a public nuisance and its incontrovertible right to restrain the commission of such public nuisance when threatened and when such commission would work a public injury." <sup>13</sup>

The government won. The court justified the injunction on the basis of the Sherman Act, and Debs and his fellows were sentenced respectively to six and three months in jail. Debs sued out a writ of habeas corpus in the Supreme Court. Olney completed his argument in the famous *Income Tax Cases*, and then turned to preparation for the *Debs* case, in which, he said, his interest was much greater. He felt confident of winning until the badly mixed decision on the income tax law was announced, after which he gave up guessing what the Supreme Court would do. <sup>14</sup>

In argument he left the discussion of the Sherman Act to his associate. The case should be decided on general equity grounds, he

<sup>11</sup> Call to Olney, July 18, 1894, D. J. File 7184-94.

<sup>12</sup> Walker to Olney, July 26, 1894, Olney Papers, Lib. Cong.

<sup>13</sup> Olney to Walker, Sept. 24, 1894, *ibid.*

<sup>14</sup> *U. S. v. Debs*, 64 Fed. 724 (1894); Olney to Tweed, Mar. 15, 1895, Olney Papers, Lib. Cong.; Olney to Peck, April 12, 1895, *ibid.*

told the Court, "and not by reason of an experimental piece of legislation like the act of 1890." The Court, in deciding against Debs, did not rest its decision on the antitrust statute. Justice Brewer, writing the opinion, took one position flatly contrary to the principle of the reconstruction cases twenty years before. "If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce," he said, "can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?" There were some contemporary criticisms of "government by injunction," but they had no appreciable effect upon the legal movement here begun."

Before the habeas corpus case was decided, a criminal case against Debs and others was brought to trial. The jury was discharged because of the illness of one of the jurors. Later when Debs was in jail for contempt of court, Olney found it best to postpone the criminal cases. "It was urged upon me that to try the criminal cases while Debs was in jail serving his sentence for contempt would be simply to invite defeat," he wrote Walker. "That opinion was shared by the Chief Justice as well as by Mr. Justice Harlan." After the habeas corpus case was decided in favor of the government, the prosecutions were ultimately dropped."

The Department of Justice performed varied functions connected with labor in the years which followed, but of a less spectacular character. Olney participated in the preparation of an arbitration act for labor in interstate commerce, and the Erdman Act was passed in 1898. Ten years later the Supreme Court held invalid that section prohibiting "yellow dog" contracts—agreements required of employees that as a condition of employment they refrain from membership in labor organizations. Such a legislative provision, outlawing such contracts, said Justice Harlan for the Court, upon both the Constitution and sound reason was an invasion of personal liberty."

The first act governing the liability of interstate carriers for in-

<sup>88</sup> Olney Memorandum, *ibid.*; *In re Debs*, 158 U. S. 564 (1895); see, for example, the *Nation*, April 4, 1895.

<sup>89</sup> Walker to Olney, Feb. 13, 1895, Olney Papers, Lib. Cong.; Olney to Walker, May 24, 1895, *ibid.*; Acting Atty. Gen. to Foote, June 19, 1895, Instr. Bk. No. 53, 126.

<sup>90</sup> Olney Memorandum, Olney Papers, Lib. Cong.; 30 Stat. 424, Sec. 10, June 1, 1898; *Adair v. U. S.*, 208 U. S. 161 (1908).

juries to workers became effective in June 1906, with the cursory approval of Acting Attorney General Purdy. In October Attorney General Moody wired district attorneys at Louisville, Kentucky, and Newark, New Jersey, that he had learned that the constitutionality of the act was about to be questioned in the courts there, and announced his intention to intervene. A number of cases were instituted soon afterward in various jurisdictions. The Attorney General intervened in two of them and lost in both. Apparently confident of victory in the Supreme Court, he appealed, the government assuming the expense in view of the fact that the plaintiffs were paupers. The government lost again, a majority of the Court, variously divided as to issues, holding the act unconstitutional. Moody, who as Attorney General had been responsible for the participation of the government in these cases, now a member of the Court, wrote a dissenting opinion. Justices Harlan, McKenna, and Holmes, also, disagreed with the majority."

A more carefully worded act was passed soon after the decision. Attorney General Bonaparte considered a draft of the measure from the point of view of its constitutionality and gave his approval. He did not take part in the oral argument when a case reached the Supreme Court in 1911, but he filed a brief. A unanimous court held the act valid."

The period witnessed strenuous efforts on the part of the Department of Justice to stamp out peonage. This variety of involuntary servitude existed in some form and in some degree throughout most of the states of the Union. It was particularly prevalent in the South where the victims were Negroes. Some state laws made it possible for a person who desired the services of a laborer to swear out a warrant against him for an alleged offense and have him taken before a justice of the peace and bound over to the next term of court, the complainant becoming surety or procuring bail for him and then taking him to his farm or plantation and compelling him to labor through fear or threat of imprisonment. Other laws permitted an

" Acting Atty. Gen. to Roosevelt, June 11, 1906, D. J. File 59-12-01; Moody to Du Relle, Oct. 19, 1906, D. J. File 91756; *Employers' Liability Cases*, 207 U. S. 463 (1908).

" 35 Stat. 65, April 22, 1908; Bonaparte to Roosevelt, April 21, 1908, D. J. File 59-12-01; *Second Employers' Liability Cases*, 223 U. S. 1 (1912).

interested party to confess judgment on behalf of a laborer accused of some offense and then have the laborer bound upon a contract made under the supervision of the court to work out the indebtedness so contracted.

"Convictions, owing to local prejudice, are difficult to secure, but they have been obtained in a number of States," reported Attorney General Wickersham in 1911. "Even where convictions have not been secured, it is thought that the acts of cruelty and oppression, which frequently mark these peonage cases, disclosed in the course of their trial, have had the effect of turning the sentiment of the people against the methods which give rise to prosecution for involuntary servitude."<sup>40</sup>

The administration of President Wilson saw a series of important problems. The Clayton Act was adopted in 1914. It contained important labor as well as antitrust provisions. According to its apparent intent, labor organizations were guaranteed a lawful status, the activities of labor freed from the prohibitions of the Sherman Act, and the interests of labor protected through provision for jury trials in contempt cases arising out of injunctions. This legislation, said President Samuel Gompers of the American Federation of Labor, "is the industrial magna charta upon which the working people will rear their structure of industrial freedom."<sup>41</sup>

The Department of Justice was faced with the necessity of fixing a policy. Where private parties secured injunctions, they demanded that the Department of Justice enforce them, since it had been the traditional function of the federal executive law officers to protect and enforce orders, decrees, judgments, and process of the federal courts. Private litigants were thus relieved of responsibility and expense, and the impression was created that the government was on their side.

In 1913 and 1914 the department was bombarded with requests from counsel that it institute contempt proceedings against persons

<sup>40</sup> Russell, *Report on Peonage*, Abstracts of Reports of the Immigration Commission, Sen. Doc. 747, 61 Cong. 3 Sess., II, 443-449; Ann. Rep. Atty. Gen. 1911, 26-27; and see *Bailey v. Alabama*, 219 U. S. 219 (1911), and Ann. Rep. Atty. Gen. 1921, 132.

<sup>41</sup> 38 Stat. 730, Secs. 6, 20, 21, 22, Oct. 15, 1914; *American Federationist*, XXI, 971.

violating an injunction secured by the Phillips Sheet and Tin Plate Company of Steubenville, Ohio. A contempt prosecution had been instituted by the company, but had failed on technical grounds. Asserting that the company had thereafter closed down its plant in this locality and was no longer an interested party, its private counsel, A. Leo Weil, applied to the Department of Justice to protect the honor of the court and to make an example of the offenders. Solicitor General Davis denied the request on grounds of policy. To grant it, he declared, would establish a precedent and the government would take over the performance of what ought to be a private function.<sup>44</sup>

Weil replied hotly that if general practice did not justify granting his request the practice ought to be changed. He declaimed at length on the responsibility of the government for the protection of the courts and for the maintenance of law and order. "I am writing," he concluded, "not as counsel for clients, but as citizen and lawyer, loving country, jealous of its reputation, hopeful of its future." He continued to protest to Davis, to the Attorney General, to the President, and to the public at large.<sup>45</sup> The Department adhered to its position. The power to prosecute for contempt was not denied, but the policy of automatic action rather than discretion in each case was rejected.

A related question arose in a federal court in West Virginia, where Judge Alston G. Dayton had issued an injunction against the unionization of miners in violation of "yellow dog" contracts. The mine owners instituted proceedings against union organizers for violating the injunction. The judge directed that proceedings for criminal contempt should be conducted in the name of the United States. He likewise sent word to the district attorney that he had issued attachments for miners who had violated the injunction order, saying he thought the district attorney would wish to be present in view of the fact that these cases appeared on the docket as government cases.

<sup>44</sup> *Phillips Sheet & Tin Plate Co. v. Amalgamated Association*, 208 Fed. 335 (1913); Weil to McReynolds, Oct. 28, 1913, D. J. File 169497; Davis to Weil, Nov. 25, 1913, *ibid.*

<sup>45</sup> Weil to Davis, Dec. 11, 1913, *ibid.*, and see later letters in the same file.

Calling attention to the fact that the cases had arisen out of civil litigation, the district attorney wrote Attorney General McReynolds to say that he saw no reason why his office should be represented.<sup>44</sup>

The district attorney was advised that he should not appear in any case unless it was clear that the proceeding was criminal and not civil and that, since his office had not been consulted regarding the institution of proceedings, he was to use his discretion as to the propriety of appearing at all. "The Department sees no objection to your informing the courts that in cases in which you may properly prosecute criminal contempts," the instructions continued, "you desire to be consulted before such proceedings are instituted."<sup>45</sup>

A concerted effort was made to bring about the impeachment of Judge Dayton, and it was found necessary to authorize the appointment of deputy marshals to protect him and his property. When miners threatened wholesale violations of the injunction, the federal marshal asked for authority to employ deputies to aid in enforcing the injunction order. The request pointed toward the establishment of another precedent—that the federal government take upon itself the protection of private property in labor disputes. Attorney General McReynolds replied that such action would be justified only by evident preparation for successful violation of the injunction, with harm to persons or property. He directed that the facts and his telegram be submitted to the district attorney, who was to consult the court and then wire his and the court's joint recommendation.<sup>46</sup> The Attorney General's message showed such reluctance that the hope of securing a police force of federal deputies was evidently abandoned.

Next came a demand for the enforcement of an injunction in the coal mining region in Arkansas. The Bache-Denman Coal Company owned a controlling interest in eight other coal companies, all of which were operated as a unit, employing union labor. Plans were made for operation with non-union labor. Violent conflict seemed

<sup>44</sup> Wilcox to Walker, Feb. 13, 1914, D. J. File 50-301, Sec. 1; Walker to McReynolds, Jan. 23, 1914, *ibid.*

<sup>45</sup> Wallace to Walker, Jan. 28, 1914, *ibid.*

<sup>46</sup> See House Rep. 1490, 63 Cong. 3 Sess.; Smith to McReynolds, Mar. 18 and May 13, 1914, McReynolds to Smith, May 15, 1914, and later letters, D. J. File 50-301, Sec. 1.

inevitable. Federal District Judge Youmans granted an injunction against interference with operations and directed the marshal to take such measures as might become necessary to enforce the order. The marshal, upon the advice of the judge, asked for authority to commission as many as fifty deputies. Authorization was given, and then withdrawn on the advice of the district attorney. When some violence occurred, however, the district attorney had the deputies appointed.<sup>47</sup>

Assistant Attorney General Wallace in the meantime made a study of the powers of the federal government and came to the conclusion that the United States had no right to set up a police force for the protection of private property unless such property was actually in the custody of the courts. If it were in such custody, the court would have a qualified ownership and the incidental right of conferring protection,<sup>48</sup> but no such right was conferred merely by the issuing of an injunction against a private party.<sup>49</sup> Attorney General McReynolds thereupon wired directions to release the deputies assembled, and the gist of the opinion was sent by letter. Counsel for the companies, together with owner and manager Bache, hurried to Washington to persuade the Department of Justice to provide police protection. His plea was largely without avail; three deputies were stationed in different sections of one district.<sup>50</sup>

Soon after the withdrawal of the deputies, union miners attacked and destroyed property at mines about to be opened with non-union labor. State officials were unable or unwilling to preserve the peace. The department adhered to its position that deputies should not be appointed to police the property, but Attorney General McReynolds directed the marshal to investigate the situation and make necessary arrests upon evidence of violations of the injunction. Contempt proceedings which were merely a part of the original case and were

<sup>47</sup> Mayes to McReynolds, May 9, 1914, D. J. File 16-32, Sec. 1; McReynolds to Mayes, May 13 and 14, 1914, *ibid.*; Bourland to McReynolds, June 2, 1914, *ibid.*

<sup>48</sup> See D. J. Files 16-36, 39-6-0, 16-83, 16-190, and 16-207 for other statements on the protection of property in the hands of the court.

<sup>49</sup> Wallace Memorandum, June 4, 1914, 16-32, Sec. 1.

<sup>50</sup> McReynolds to Mayes, June 5, 1914, *ibid.*, and to Hatfield, July 27, 1932, D. J. File 16-190; Wallace to Bourland, June 5, 1914, 16-32, Sec. 1; McDonough to McReynolds, June 8, 1914, *ibid.*; Davis to Mayes, June 9, 1914, *ibid.*

prosecuted by the complainants as auxiliary to their general remedial rights, he stated, should not be prosecuted by the United States nor should the United States pay any of the expenses."<sup>1</sup>

The owners and apparently the judge were not satisfied with having the aid of the government limited to the assumption of responsibility for criminal contempt prosecutions. On the occasion of their visit to Washington, they had been told that police protection would not be granted for private property but that to the full extent of the law protection would be given to property actually in the custody of the court. Shortly after the first riot, the owners placed the property in the hands of the court; the judge appointed Franklin Bache, the manager and principal owner of the property, as receiver.

The obvious strategy of this maneuver enraged union sympathizers, but for the most part it was successful. The judge notified the Attorney General of the receivership and urged that the district attorney be directed to take full charge of cases of violation of the injunction, the costs to be paid by the government. The desired instructions were given and arrangements made to protect the judge from possible violence."<sup>2</sup>

Counsel for the owners once again applied to the Department of Justice for police protection. In the eyes of the law, the property was now in the custody of the court. "The court," Assistant Attorney General Wallace wrote District Attorney Bourland, "may either authorize the receiver to hire guards, or it may order the United States Marshal to guard the property, *ordering* the expense in either event to be paid by the property, as other expenses of the receivership." Any appointments of deputies by the marshal would be confirmed by the Department of Justice and the department would act vigorously to punish any interference with the marshal's force. Later the marshal was directed as far as possible to appoint as deputies the employees of the receiver. "You should be able to use them on emergency by instant deputization," said Wallace, "as in the case of a posse suddenly summoned." The government would pay deputies

<sup>1</sup> McReynolds to Bourland, July 23, 1914, *id.*, Sec. 2.

<sup>2</sup> Hull to Wallace, Nov. 14, 1914, *id.*, Sec. 3; Judge Youmans to McReynolds, July 28, 1914, *id.*, Sec. 2; Wallace to Bourland, Aug. 5 and 14, 1914, *ibid.*



while actually in service, but the receiver was to reimburse the United States twice a month for the whole expense."<sup>55</sup>

So determined were the union miners that, despite the appointment of deputies, there were outbursts of violence. Receiver, owner, and manager Bache thereupon visited the Attorney General to ask that troops be sent, and his request was finally granted."<sup>56</sup>

It became quite apparent to the Department of Justice that the appointment of Bache as receiver was one of the major incentives to trouble. Attorney General Gregory discussed the whole situation with both the President and Secretary of War Garrison. "The retention in control of the very person with whom the labor leaders have been at war," Gregory wrote the judge, "suggests to the ignorant, and enables the vicious to plausibly assert, that the court has turned against them and formed a partnership with their so-called enemies in the struggle, and that there has been no real change of control." "<sup>57</sup>

"The matter of who is receiver is of no material importance," replied Judge Youmans. "The question will still remain, whoever may be receiver, whether an organization of men can take the law into their own hands and administer it." If the receiver were changed, other grounds of complaint would be invented. The Attorney General thereupon let the matter drop, since the discharge or selection of a receiver rested entirely in the discretion of the judge."<sup>58</sup>

After riots had occurred and several thousand dollars' worth of mine property had been destroyed, some offenders were arrested and brought to trial. They pleaded guilty but were shown no mercy. Peter R. Stewart, president of the miners' union, had made two inflammatory remarks. Otherwise his influence had been exercised against lawlessness. He was fined one thousand dollars. James Slankard was a state constable. His part consisted in failure to do his duty. He was sentenced to pay a fine of one thousand dollars and six months confinement in jail."<sup>59</sup>

<sup>55</sup> Wallace to Bourland, Aug. 31, 1914, *ibid.*; Wallace to Parker, Oct. 28, 1914, *id.*, Sec. 3.

<sup>56</sup> Wallace to Hull, Oct. 31, 1914, *ibid.*

<sup>57</sup> Gregory to Youmans, Dec. 19, 1914, *id.*, Sec. 4.

<sup>58</sup> Youmans to Gregory, Dec. 24, 1914, and Gregory to Youmans, Jan. 1, 1915, *ibid.*

<sup>59</sup> Fitts to Todd, Jan. 20, 1915, and Fitts, Memorandum, Jan. 25, 1915, *ibid.*

Clint Burris, a middle-aged man of large family, had been a coal miner all his life. "He did not realize the difference between Bache, the manager of the old company which had thrown the miners down, and Bache after he had been dedicated as Receiver by the decree of the Court," reported Wm. C. Fitts, Special Assistant to the Attorney General. "The same was true of most of the others including John Manick, a young foreigner, possessed of bright face and mother wit, but unacquainted with our institutions and Courts, and Sandy Robertson, a stripling of a country boy, born and raised right at the mine and regarded anybody who put him out of that mine as depriving him of a part of his birthright." These three were each sentenced to pay fines of \$500 and to suffer three months imprisonment in the county jail.

By their voluntary pleas, Fitts continued, these people had confessed their guilt, and it could not be argued that they had been cruelly convicted or that the government had interfered on the side of the company. "Having been on the ground, and after long and intimate acquaintance with this class of people and their tendency to claim that they are oppressed," he concluded, "I am prepared to say that the after effect is going to be a hundredfold more beneficial than could have been obtained by any other possible disposition of the troublesome situation." \*\*

The mine owners sought further satisfaction from the United Mine Workers by bringing a treble damage suit under the antitrust laws. The litigation ran on for thirteen years, and ended when the union agreed to pay \$27,500. The case established that unincorporated organizations such as labor unions could be sued in federal courts, and similar proceedings became a potent threat to the funds of labor organizations.\*\*

Other controversies arose during the same period, in which the department's policies varied with reference to the appointment of deputies and prosecutions for contempt. In 1916 the railroad brotherhoods were making a drive for the eight-hour day and time-and-a-half pay for overtime. The increase of business due to the war in Europe

\*\* *Ibid.*

\*\* *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922).

and the consequent scarcity of labor provided leverage for more than normally effective bargaining with employers, but the companies refused to accede to the demands. They offered to arbitrate the dispute, but the brotherhoods refused. President Wilson intervened in vain. When a strike was about to tie up the entire transportation system of the country, he appealed to Congress for compulsory legislation.

The railroads prepared to meet the strike, scheduled for Labor Day, September 4, 1916. Roads in good financial standing and receivers of others appealed to United States marshals for deputies to protect their property, or asked that trusted employees be deputized in order to have governmental sanction for the use of force in defending railroad property. "You are not a police officer, and it is not a part of your function to police property, railroad or otherwise, within the limits of a State," read a statement framed for the Attorney General, when the marshals forwarded these requests. "You could only be related to the question in the event that property in the hands of a receiver, appointed by a Federal court, was imperilled, and in such a case you would only act under definite orders of court, made upon proper application in receivership proceedings, which orders would define your duties and powers." \*\*

The strike was averted by the hasty passage of the Adamson Act. It established the eight-hour day for employees of railroads operating in interstate commerce with time-and-a-half pay for overtime and further provided that during a period of some months, when the system would be under observation by a government commission, the existing daily wage rate should not be reduced. A test case was hurried to the Supreme Court to determine the constitutionality of the act. It was argued January 8, but a decision was not handed down for more than a month. The brotherhoods grew restive under the delay, the railroads refused to make concessions, and a strike again threatened. Once more police assistance was sought for the railroads.<sup>21</sup> Under pressure from the President, based on the imminence of war, a settlement was reached conceding the demands of labor, and on the

\*\* Acting Atty. Gen. to Dallman, Sept. 2, 1916, D. J. File 59-6-0, Sec. 1.

<sup>21</sup> 39 Stat. 721, Sept. 3 and 5, 1916; Graham to Storen, Mar. 16, 1917, D. J. File 59-6-0, Sec. 1.

same day the Supreme Court handed down a five to four decision holding the Adamson Act constitutional."<sup>22</sup>

The participation of the United States in the World War accentuated these labor problems and added new ones. The production of war materials increased the demand for labor, while the enlistment of men for military purposes reduced the supply. Prices rose rapidly, and necessity as well as opportunity led labor groups to demand concessions. Employers resisted. Those producing materials under contracts with the government maintained that strikes against them were the equivalent of strikes against the government and sought governmental protection.<sup>23</sup>

As wartime machinery began to function, most requests were forwarded to some agency other than the Department of Justice—the Board of Mediation and Conciliation, the War Department, the Labor Department, or the National Defense Council. Except in case of businesses, such as railroads and telegraph, which were taken over and operated by the government, the department refused to regard as governmental instrumentalities those organizations manufacturing goods essential to the conduct of the war. It therefore refused to participate in the settlement of labor disputes, unless there were grounds which would have been valid in times of peace.<sup>24</sup>

While the department, under Attorney General Gregory, was careful not to use the wartime emergency as a ground for interfering with labor activities, there were instances in which federal judges recognized a peculiar wartime relation between the businesses affected by labor controversies and the government itself. The Wagner Electric Company, for example, was engaged primarily in the manufacture of supplies for the government, in a building erected at government expense, and was using raw materials provided by the government. A strike to compel the company to abandon the open shop was enjoined. The company was, Judge Pollock said, "to all intents and purposes an instrumentality or agency of the government

<sup>22</sup> *Wilson v. New*, 243 U. S. 332 (1917); see Berman, *Labor Disputes and the President* (1924), 118-119. <sup>23</sup> *Fitts v. Wertz*, May 3, 1917, D. J. File 16-43.

<sup>24</sup> See, for example, St. Paul Minn. telephone strike, 1918, D. J. File 16-111, Mooney demonstrations at Toledo, 1918, D. J. File 198953, Illinois Central Railway strike, 1918, D. J. File 16-115, Seattle general strike, 1919, D. J. File 16-117, New York harbor strike, 1919, D. J. File 16-116.

itself, created and existing under national laws." He directed the marshal to appoint deputies to enforce the injunction, and the Department of Justice cooperated to the extent of authorizing the appointments."<sup>66</sup>

The scarcity of man power became so great that the solicitation of labor caused serious friction among employers. Firms producing war materials, other firms not producing such materials, and the government itself—for the erection of military camps, the production of nitrates and other purposes—sent agents throughout the country to recruit workers. Prospective employment was pictured in glowing fashion, and men were frequently drawn from areas where they were already badly needed. While the purpose of the government was to gather up those not needed in their home regions, it was not feasible at times to restrict recruiting to such persons. In any event solicitation created discontent among workers who remained, thereby adding to the labor problems of local employers.

A number of states, particularly in the South, placed prohibitive taxes on the solicitation of labor, and some had laws wholly forbidding the solicitation of laborers from employers whom they were serving under contract. Attempts were made to enforce these laws against agents of the government and against agents of corporations working with the government in the production of war materials. The Department of Justice took the position that in neither case could the state laws be enforced and directed the district attorneys to protect the labor agents."<sup>67</sup>

Effort was made to avoid discordant relationships with the states, but the government nevertheless adhered to the position that it had the right, and firms producing goods for it had the right, to seek labor wherever it was to be found, notwithstanding state laws."<sup>68</sup> Federal employment agencies were established throughout the country to provide for greater fluidity in the movement of labor to points where it was most in demand.

Both labor and capital became restive under the mediation or

<sup>66</sup> *Wagner Electric Mfg. Co. v. District Lodge*, 252 Fed. 597 (1918); *Graham vs. Lynch*, June 22, 1918, D. J. File 16-105.

<sup>67</sup> See, for example, *Brown vs. Alexander*, June 26, 1918, D. J. File 191906.

<sup>68</sup> See D. J. Files 185731, 186415, 191412, 192254, 192200, 192362, 192365, 192542, 192685, 192748, 192770, 193035, 193056, 193389, 193996, and 196161.

control of the several wartime agencies, but found it well to submit. With the armistice, both groups grew more impatient under restraint. Employers looked about for ways of freeing themselves from necessities of negotiation and sought wage adjustments in the direction of pre-war schedules. Labor likewise sought means of keeping the rising scale of wages above the rising cost of living and hoped to consolidate its new-found influence. Strikes threatened or created disorder, scarcity, and higher prices. There was substantial sentiment in opposition to any drastic measures labor might take to secure its ends.

The first major conflict came with the bituminous coal strike of 1919. The industry had prospered during the war, and neither the operators nor labor seemed to be aware of the possibility of depression. A miners' wage agreement had been worked out in 1917, to run for the course of the war but not beyond April 1, 1920. Although actual hostilities had ceased in November 1918, the war had not been officially terminated, and a number of statutes based upon war powers were still enforced. The operators and the government preferred to regard the wage agreement as still binding, but the miners took the view that the war was at an end. The United Mine Workers announced the termination of the agreement, and a strike was called for November 1, 1919, if the demands were not granted.\*\*

President Wilson, Secretary of Labor Wilson, and other government officials vainly sought to prevent the strike by negotiation. Attorney General Palmer then tried to prevent the strike by resort to an injunction based on the Lever Act which had been passed to prevent profiteering in necessities and prohibit combinations restricting supply and raising prices. The American Federation of Labor had acceded to the enactment of the measure only after its leaders were persuaded that it would not interfere with labor activities. They claimed, indeed, that Attorney General Gregory had given assurance that the district attorneys would be instructed not to enforce the measure against labor.\*\*

\*\* For a summary, see Berman, *op. cit.*, 177 *et seq.*

\*\* 40 Stat. 276, Aug. 10, 1917, and 41 Stat. 297, Oct. 22, 1919; Gompers to Palmer, Nov. 22, 1919, and other letters, D. J. File 205722; Gregory to Garfield, Jan. 11, 1919, D. J. File 16-116.

Attorney General Palmer, however, paid no heed to any such commitment. He sent Assistant Attorney General Charles B. Ames to Indianapolis to confer with the federal district judge. The conference was held on October 31, and later in the day the district attorney filed a bill of complaint asking a restraining order against the strike. Injunctions were granted, and the leaders were commanded to cancel the strike order. They obeyed, and Palmer was convinced that the cancellation would defeat the strike by making it leaderless. But he reckoned without the zeal of the miners, for in spite of the absence of direct leadership the strike brought to a standstill seventy-five per cent of the industry."<sup>10</sup>

The President, the Labor Department, and the Fuel Administration continued their efforts to work out a settlement. They eventually secured an agreement whereby the miners were to return to work at an immediate wage increase of fourteen per cent, both sides to accept the subsequent adjustments recommended by a commission of three persons to be appointed by the President. After the commission had reported, adjustments were made granting approximately half the wage increase asked by the miners but not granting the six-hour day.

There was some criticism from labor sympathizers, but Palmer received letters varying chiefly in the extent of their praise. "A lion-hearted man, with a great Nation behind him, has brought order out of chaos," wrote T. A. Lancaster, referee in bankruptcy at Lexington, Tennessee. "You have shown that a body of great States are not bound together with a chain of sand, but with bands of steel, and that the United States is not a myth, but a virile, mighty power which shows itself when a man who measures up to the duties of the hour is at the helm." Palmer replied briefly, "You have stated the issue with great clearness."<sup>11</sup>

Palmer began to be mentioned as a possible Democratic nominee for the Presidency. "Evidence obtained at the time of this strike showed active participation therein of the Communist Party of America, urging the workers to rise up against the Government of the United States," he reported to Congress at the close of 1920.

<sup>10</sup> For these events see D. J. File 16-130-26.

<sup>11</sup> See the two special sections of D. J. File 16-130-0; Lancaster to Palmer, Nov. 14, 1919, and Palmer to Lancaster, Nov. 18, 1919, *ibid.*

"The injunction issued by Judge Anderson, at Indianapolis, brought the strike to an end and with it the activities of such ultraradicals as had sought to take advantage of the strike for their own purposes." <sup>73</sup>

The years following 1918 witnessed a series of labor struggles in a variety of fields, such as the great steel strike of 1919. The Department of Justice had little to do with some and much to do with others. <sup>74</sup> Attorney General Palmer continued a vigorous policy against radicals. Labor had failed in its efforts to unionize the steel industry, and defeats of other kinds were imminent. In 1917 the Supreme Court had sustained the use of injunctions to protect "yellow dog" contracts. There began a series of decisions which destroyed the hopes of labor based on the Clayton Act of 1914. <sup>75</sup> The depression of 1921 reduced the number of jobs and increased the competition for those remaining, accompanied by a fall in prices which provided plausible argument for wage reductions. Labor resisted and in many instances suffered defeat as well as loss of morale and prestige.

The most dramatic and the most significant of the struggles of labor to hold its position was the strike of the railway shopmen in 1922. Since the return of the railroads to private management under the Transportation Act of 1920, the shopmen had suffered from non-union competition. A number of railroads had contracted shop work to concerns not unionized. The Railroad Labor Board, set up in accord with the Transportation Act, was unable to enforce a decision against this practice. Making matters worse for labor, the board concluded that the reduction in living costs would justify a wage reduction for shopmen and set July 1, 1922, as the day on which the reduction should take place. <sup>76</sup>

<sup>73</sup> Ann. Rep. Atty. Gen. 1920, 175.

<sup>74</sup> See Kansas City street railway strike, 1919, D. J. File 16-114-29; telephone and telegraph strike, 1919, D. J. File 16-125; phosphate miners' strike, Fla., 1919, D. J. File 16-124; New York waterfront strike, 1919, D. J. File 16-135; railroad strike of 1920, D. J. File 16-145; marine strike of 1921, D. J. File 16-140.

<sup>75</sup> *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229 (1917). *Clayton Act: Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921); *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922) and 268 U. S. 295 (1925); *U. S. v. Brims*, 272 U. S. 549 (1926); *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n.*, 274 U. S. 37 (1927); see also *Stephens v. Ohio State Telephone Co.*, 240 Fed. 759 at 770 (1917).

<sup>76</sup> 41 Stat. 456, Feb. 28, 1920; for the powers of the Labor Board, see *Penna. R. R. v. Labor Board*, 261 U. S. 72 (1923), and *Penna. Federation v. P. R. R. Co.*, 267 U. S. 203 (1925); for a summary of events, see Berman, *op. cit.*, 226 *et seq.*



The shopmen announced a strike for the same date, and the strike continued in spite of the efforts of the President and the Labor Board to bring it to an end. The railroads set about recruiting non-union men to replace the strikers and planned thereafter to deal with employees through company unions. The number of non-union workers available seemed to assure success to the railroads, if violence and intimidation could be prevented.

The population in the vicinity of the shops was often made up so largely of shopmen, their friends, and tradesmen dependent upon their good will that local preservation of order was difficult to secure. The Department of Justice spent \$1,922,639.45 for various purposes, such as the salaries and expenses of deputy marshals selected so far as possible from among persons having connection neither with the railroads nor with the unions."<sup>16</sup>

The strike continued throughout July and August, and grew more and more serious. Attorney General Daugherty hastened to complete the outline of drastic action on which he had been quietly at work for two months. He first persuaded President Harding to announce on August 18 that all the power of the government would be used to maintain transportation and to sustain the right of men to work. Daugherty himself set out for Chicago where on September 1 he appeared before Judge Wilkerson to request a restraining order against the shopmen."<sup>17</sup> He declared that the unions, in not accepting the wage reduction decision of the Railroad Labor Board, had held the government of the United States in contempt. "I will use the powers of the Government to prevent the labor unions of the country from destroying the open shop," he added."<sup>18</sup>

The court granted a drastic injunction. It prohibited attempts to persuade shopmen to abandon or refrain from entering railroad employment "in any manner by letters, printed or other circulars, telegrams, word of mouth, oral persuasion, or suggestion, or through

<sup>16</sup> Ann. Rep. Atty. Gen. 1922, App. 32; Daugherty to Killits, July 20, 1922, D. J. File 36 N. 331.

<sup>17</sup> Daugherty and Dixon, *The Inside Story of the Harding Tragedy* (1932), 122-168.

<sup>18</sup> The *New York Times*, Sept. 2, 1922. Harry Micajah Daugherty (1860- ) was born at Washington Court House, Ohio, practiced law there and later in Columbus, was a member of the state legislature, and became Attorney General (1921-1924) in the cabinet of President Harding.

interviews to be published in newspapers or otherwise in any manner whatsoever." The extreme character of the order brought considerable criticism and little praise.\*\*

Daugherty, at first irked by criticism, was reported to have said that he would pay no attention to "loose and irresponsible conversation on the part of people who may themselves be brought into court." Such comments merely added to the warmth of protest, and he found it advisable to issue a statement that the government had no intention to abridge personal liberty or constitutional rights of free speech and lawful assembly. The statement caused some surprise in view of the language of the order, by which laborers were, as one critic put it, "condemned thereafter to a life of silent meditation and prayer."\*\*

When thereafter Daugherty appeared before Judge Wilkerson to ask for a permanent injunction, he presented a mass of evidence to show a condition of disorder calculated to interfere with interstate commerce. The injunction was granted, somewhat modified in its details but exceedingly drastic in its prohibitions. The strike continued indefinitely on some of the roads, where non-union workers permanently carried on the work formerly done by union labor. All the roads were able to operate, and as a practical matter the strike had failed. In September and thereafter agreements were worked out between some of the roads and their employees, whereby union men returned to work and were enabled to salvage something of what they had before the strike began.

Some of Daugherty's friends sought to defend him against the charge of enmity to organized labor. The United States Attorney at San Francisco called attention to the fact that in a building trades controversy in his district Daugherty had come to the defense of the unions, where an organization of business men known as the Builders' Exchange had such control of the supply of building materials as to be able to withhold sale to contractors employing more than fifty per cent of union men among their laborers. When the case was won by the government, a press release was prepared describing Daugherty's part in the case. The San Francisco Labor Council forwarded

\*\* Berman, *op. cit.*, 237-238; *New York Times*, Sept. 6, 1922.

\*\* *Ibid.*

a copy of resolutions in praise of the Department of Justice and many individuals who had aided in winning the victory. The name Daugherty was not mentioned. On the letter of enclosure is written, "Why omit my name in resolutions whereas I heard, directed and ordered it all." <sup>81</sup>

For the most part the activities of the department thereafter were routine. There were many investigations of unions and radicals, but little ground was found for action. The rising tide of prosperity alleviated the situation for the moment. The application of the Sherman Act to combinations of labor had provided many embarrassments for the Department of Justice. Sentiment had been strong enough for a decade and a half, beginning in 1913, to secure the insertion of a provision in the appropriation bills prohibiting the expenditure of the federal antitrust appropriation in labor disputes.

In recent years, racketeering under the guise of unionism, with no legitimate relationship to the aims of organized labor, again called forth use of the Sherman Act. "Labor racketeering is widespread," said Attorney General Mitchell in 1930. "It is an important phase of gangster rule and breakdown of law and order. The local authorities are often helpless or corrupt. In its campaign for law enforcement the federal government can perform a real public service by going after the racketeers, wherever they violate Federal law." <sup>82</sup>

The years of agitation against labor injunctions culminated in 1932 in the approval of the Norris-LaGuardia Act to restrict the issuance of injunctions in labor cases in federal courts. At the final vote there was little opposition in Congress. Some interests urged the President to veto the bill, and the Attorney General was importuned to give advice to that effect. When President Hoover referred the measure to Attorney General Mitchell, the matter received careful consideration in the Department of Justice. The conclusion was

<sup>81</sup> *U. S. v. Industrial Association*, 293 Fed. 925 (1923), reversed by the Supreme Court in *Industrial Association v. U. S.*, 268 U. S. 64 (1925); Press Release, Nov. 10, 1923, D. J. File 60-12-4, Sec. 4; O'Connell to Atty. Gen., Nov. 19, 1923, *ibid.*

<sup>82</sup> Mitchell, Memorandum for Mr. O'Brian, Nov. 4, 1930, D. J. File 60-138-43. William DeWitt Mitchell (1874- ) was born at Winona, Minnesota, practiced at St. Paul, served on several city charter commissions and was regional counsel of the United States Railroad Commission in 1919, became Solicitor General of the United States in 1925, and was appointed Attorney General (1929-1933). Thereafter he returned to the practice of law, in New York City.

reached that no accurate prediction could be made as to how the courts would interpret many provisions of the act. The Attorney General thought it futile to enter into a discussion of constitutionality.

While he recommended that the bill be approved, he felt some reluctance but was satisfied by his interpretation of the measure. "It is inconceivable that Congress could have intended to protect racketeering and extortion under the guise of labor organization activity, and the anti-trust division of this Department, having carefully considered the measure, has concluded that it does not prevent injunctions in such cases and that it does not prevent the maintenance by the United States of suits to enjoin unlawful conspiracies or combinations under the anti-trust laws to outlaw legitimate articles of interstate commerce," he declared. "It does not purport to permit interference by violence with workmen who wish to maintain their employment, and, fairly construed, it does not protect such interference by threats of violence or that sort of intimidation which creates fear of violence." The bill was approved by the President on the same day.\*\*

As the federal government has shown less and less inclination to take part in attempts to restrain *bona fide* labor activities, industry has been left to secure private injunctions where the federal courts will grant them, or to resort to state authorities\*\* or to wholly private measures. In 1936 the Senate ordered a committee investigation of undue interference with the right of labor to organize and bargain collectively, and Congress prohibited the interstate transportation of men to interfere with peaceful picketing.\*\*

As the ripple of federal labor legislation begun in Civil War days has widened, it has been marked by such decisions as *Adair v. United States*, holding unconstitutional a federal statute prohibiting the discharge of railroad employees for membership in labor organizations;

\*\* Mitchell to Hoover, Mar. 23, 1932, D. J. File 75429, Sec. 3; 47 Stat. 70, Mar. 23, 1932, and see Nevas, *Norris-LaGuardia Anti-Injunction Act*, Cornell L. Q. (Dec. 1935), 137.

\*\* See *State Anti-Injunction Legislation* (1935), 33 Mich. L. Rev. 777; Brissenden, *The Labor Injunction* (1933), 48 Pol. Sci. Q. 413, 426-427; Brissenden, *The Campaign Against the Labor Injunction* (1933), 23 Am. Econ. Rev. 42.

\*\* Cong. Rec., 74 Cong. 2 Sess., 9186; Public No. 776, 74 Cong. 2 Sess., June 24, 1936.

*Hammer v. Dagenhart* and *Bailey v. Drexel Furniture Company*, holding the federal child labor acts invalid; *Adkins v. Children's Hospital*, holding the minimum wage statute for women in the District of Columbia void; *Railroad Retirement Board v. Alton Railroad*, holding the federal railway pension statute unconstitutional; *Schechter Poultry Corporation v. United States*, holding the wage and hours provisions of the National Recovery Act invalid; and *Carter v. Carter Coal Company*, holding that the wage and hour provisions of the Bituminous Coal Conservation Act rendered the whole statute void.<sup>88</sup> These acts represented a related phase in the story of labor and the law—the attempt to solve by legislation the problem which nearly half a century of injunctions has made so bitter. In the field of interstate transportation, federal statutes and agencies now cope with some of the conflicts between wage earners and industrial organizations.<sup>89</sup>

<sup>88</sup> *Adair v. U. S.*, 208 U. S. 161 (1908); *Hammer v. Dagenhart*, 247 U. S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922); *Adkins v. Children's Hospital*, 261 U. S. 525 (1923); *Railroad Retirement Bd. v. Alton R. Co.*, 295 U. S. 330 (1935); *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495 (1935); *Carter v. Carter Coal Co.*, 36 Sup. Ct. 855 (1936).

<sup>89</sup> Ann. Rep. Natl. Med. Bd. 1935, 6-7, Railway Labor Act, 44 Stat. 577, May 20, 1926, 48 Stat. 1185, June 21, 1934, and *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548 (1930); Hours of Service Act, 34 Stat. 1415, Mar. 4, 1907, and *B. & O. R. Co. v. I. C. C.*, 221 U. S. 612 (1911).

## CHAPTER XXII

### UNHOLY SANCTUARY

"THE laxness and inefficacy of government really alarms me." So wrote Edmund Randolph, then Attorney General of Virginia, to James Madison in 1782. A gang of blacks and whites was ravaging the countryside, led by an escaped convict. "Nay, I do not believe that government can by any means in its power effect the seizure of this man," said Randolph. "I live in the centre of the late depredations, and have no other hope to avoid their wickedness than by the awe which my office may create." In New York, said Captain Bourgeois, a French naval officer who visited there after the Revolution, "the inhabitants engage in contraband trade with marvelous skill."<sup>1</sup> One hundred and seven years later, in 1889, Attorney General Miller reported that in some districts both civil and criminal cases could not proceed in the courts of the United States because the lives of witnesses were in such danger that it would be "simply inhuman" to enforce their attendance at trials, and that in certain localities no occupation was so dangerous as a faithful performance of duty by United States marshals.<sup>2</sup>

In medieval times, private vengeance and feud had slowly given way to modified forms of private warfare, such as "trial by combat" introduced into England by William the Conqueror and the "exceptional privilege" of peace limited to certain times, places, and persons. The first feeble attempts at keeping the public peace were made through crude tribunals of justice. These gradually carved out the more vicious and important types of violence against persons and property as offenses punishable by the state itself.<sup>3</sup>

The criminal law became part and parcel of the main currents

<sup>1</sup> Conway, *op. cit.*, 50-51; Hough, *op. cit.*, xxi.

<sup>2</sup> Ann. Rep. Atty. Gen. 1889, 15.

<sup>3</sup> Stephen, *Criminal Law of England* (1883), I, 60, 61; Holdsworth, *History of English Law* (1909), II, 33-34, 154-156; III, 243-249; Kenny, *Outlines of Criminal Law* (1934), 21 *et seq.*

of government, morals, religion, science, and trade. A leading part in English constitutional history was played by the courts of criminal justice before which, as the historian of English criminal law, Sir James Stephen of the High Court of Justice, has put it, "the contending parties alternately appeared, charged by their adversaries with high treason, generally on perjured evidence, and before judges who were sometimes cowardly and sometimes corrupt partisans." "With the restriction of royal power, the criminal law waned as the tool of politics. It ceased to be the instrument for regulating the private warfare of great lords and came to be the means of protecting property and the unarmed citizenry from the depredations of their more unscrupulous fellows.

The system of English criminal justice crossed the ocean with the colonists, but at the same time it represented the heavy hand of royal power. Not only royal judges and attorneys, but the laws of England itself, were odious before and after the Revolution. The judges, however, leaned strongly to the view that both civil and criminal common law jurisdiction had been vested in the state and federal courts. Finally, in 1812, a year when things English were more unpopular than usual, the issue was squarely raised. A prosecution for criminal libel was brought against Hudson and Goodwin for publishing a statement in the Connecticut *Courant* charging the President and Congress with secretly voting a \$2,000,000 present to Napoleon. When the case came before the Supreme Court on the sole issue of jurisdiction, both Attorney General Pinkney and the defendant's counsel for some reason refused to argue the case. The Court, left to its own devices, held that it had "long since been settled in public opinion" that the federal courts had no common law criminal jurisdiction."

Two years later District Attorney Blake of Massachusetts asked Attorney General Rush what could be done to American citizens who went openly to English war vessels for reasons unknown. Rush was in a quandary. He could not bring the matter under any federal

<sup>4</sup> Stephen, *op. cit.*, I, ix, x, 359-360, 369-370.

<sup>5</sup> Kent, *Commentaries* (1826; 14 ed. 1896), I, 331-341; Watson, *Growth of the Criminal Law of the United States* (1902), House Doc. 362, 57 Cong. 1 Sess., 3; *U. S. v. Hudson*, 7 Cranch 32 (1812).

statute. "I do not think that a Federal Republic like ours, resting upon, as its only pillars, the limited political concessions of distinct and independent sovereign States, drew to itself, by any just implication, at the moment of its circumscribed structure, the whole common law of England, with all or any portion of its dark catalogue of crimes and punishments," replied the Attorney General. "Against the incorporation of such a code, even with the limitations that might be implied, upon the jurisprudence of the Union, I perceive serious and insurmountable objections."

Rush could only suggest that such a culprit be arrested and taken before a proper judge. "If this cannot be done with a view to prosecute him by indictment, it at least may be with a view to lay the foundation of a charge on which he may be bound in sufficient sureties to his good behaviour; for such intercourse with the enemy puts him under a suspicion so strong, that the law should be awake with all its vigilance and activity. It lies on the direct road to treason; seems an approximation to it, opening at once every facility to its commission by taking the first and natural step. If no crime, in the moral scale, has in fact been perpetrated, such verisimilitude of criminal intention is held out, as should put the party upon his excuse." \*

Rush's devotion to the "no common criminal law of the United States" theory met another test in 1816 when, in *United States v. Coolidge*, the question again arose. Rush informed the Court that after much anxious attention he had reached the conclusion that the 1812 case concluded the matter. He would therefore not argue. The Court was sharply divided on the authority of that case, but declined to review an unchallenged opinion.<sup>7</sup> Thus the criminal jurisdiction of the United States became restricted to statutory crimes partly because two Attorneys General, either from constitutional scruples or dislike of the penalties of the common law, did not see fit to argue otherwise.

This threw upon Congress and the Executive the initiative in the development of a federal criminal law, to be solved very popularly

\* Rush to Blake, July 28, 1814, Ann. Cong., XXVIII, 1821 at 1824-1825.

<sup>7</sup> *U. S. v. Coolidge et al.*, 1 Wheat. 415 (1816), and see *U. S. v. Bevans*, 3 Wheat. 336 (1818), and Warren, *op. cit.*, I, 441, 442.



by leaving to the states the prohibition of acts known to the common law as the more important crimes, except upon the navigable waters and the seas, on federal reservations such as navy yards and army posts, and in the territories and District of Columbia. The national government, however, created and defined a list of crimes in order to protect federal property and the exercise of restricted federal powers over the mails, the collection of revenue, the issuance of coin or securities, and for the discipline of federal officers and the protection of the nation against treason.\*

The exceedingly simple and limited federal criminal law was embodied in the crime acts of 1790 and 1825, the survivals of which were to comprise the gist of the law well into the twentieth century. In the first of these, treason, theft of federal implements of war, counterfeiting or forgery of federal securities, perjury, forgery of judicial records and bribing of judges, rescue of federal prisoners, and attempts to subject ambassadors to the execution of the laws were made federal offenses. In addition, on federal reservations and on navigable waters and the seas, murder, manslaughter, robbery, mutiny, piracy, mayhem, receiving stolen property and harboring felons were defined as crimes against the United States. As illustrative of the debt to English terms and technicalities of criminal justice, the act prohibited "the benefit of clergy"—which at common law was merely a method of avoiding capital punishment—in any crime punishable by death.\*

During the immediately succeeding years, new federal criminal legislation concerned only neutrality, treason and sedition, "obstruction" of government, and the slave trade.<sup>10</sup> In 1808 Joseph Story introduced in the House of Representatives a proposal for the study of amendments to the crimes act of 1790 and, after he was appointed to the Supreme Court, began sketching improvements which he sent to Attorney General Pinkney. "The courts are crippled; offenders, conspirators, and traitors are enabled to carry on their purposes

\* E.g. Customs, 1 Stat. 29, Secs. 25, 29, 38, July 31, 1789.

\* Ann. Rep. Atty. Gen. 1901, 33; 1 Stat. 112, April 30, 1790; Ann. Cong., I, 35, 53, 73, 81, 834, 940, 964, 1104; II, 1519-1522; Watson, *op. cit.*, 4.

<sup>10</sup> Chs. III and IV, *supra*.

almost without check," he wrote to a member of Congress. "It is truly melancholy that Congress will exhaust themselves so much in mere political discussions and remain so unjustifiably negligent of the great concerns of the public."

He drafted legislation, submitted it for the corrections and approval of his brethren of the Supreme Court, and urged it again and again. "If I shall be so fortunate as to meet your opinions on this subject, and the public so fortunate as to interest your zeal and talents in the passage of the bill, it will establish an epoch in our judicial history which will be proudly appealed to by all who in truth and sincerity love the Constitution of the United States," he flattered the Attorney General. "It will be a monument of fame to the statesman who shall achieve it, which being independent of the political opinions of the day, will brighten as it rises amid the dust and ruins of future ages."<sup>11</sup>

Proposals for revisions and amplification were placed before Congress without effect until in 1825 the second crime act specified or more particularly defined as offenses against the United States only perjury, extortion by federal officers, and embezzlement, fraud, forgery, and counterfeiting or debasing of certificates, bills, notes, drafts, and coins of the United States or the Bank of the United States. On the few federal reservations, incendiarism was made a crime and state laws specifying other offenses were made applicable. Only on the seas and navigable waters were murder, rape, assault, robbery or destruction of vessels, receiving stolen property, causing shipwreck, abandonment of seamen in foreign ports, forgery of ship's papers, and the burning or destruction of vessels of war specified and defined as crimes. The measure, sponsored in the House by Daniel Webster, had passed over objections that it interfered with jurisdiction assumed by the states, that the punishments were too severe, and that there might be "collision" between federal and state authorities.<sup>12</sup>

<sup>11</sup> Story, *Life and Letters of Joseph Story* (1851), I, 242-248; Watson, *op. cit.*, 13-15. Ann. Cong., XIX, 909.

<sup>12</sup> 4 Stat. 115, Mar. 3, 1825; Ann. Cong., XLI, 1214; XLII, 2765; Register of Debates, I, 152-158, 165-168, 335-341, 348-355, 363-365.

This modest legislation, together with its few procedural provisions and a scattering of additional penal provisions in other and subsequent statutes, soon became the subject of numerous proposals and attempts at revision or "codification" of the criminal law. The writings of the English reformer Bentham and the precedent furnished by the Napoleonic Code in France impressed American statesmen. Reforms of punishment and procedure were vigorously pressed by some, but the underlying motive was the idea that all laws relating to crime should be gathered together in a simpler statement, complete and available to all who could read.<sup>13</sup>

The subject was not new. In 1790 Edmund Randolph in his report to Congress on the Judiciary Act thought the time would come, if indeed it were not already at hand, when a code of all the law, civil as well as criminal, would be indispensable. Two years later, however, he hesitated at the magnitude and the pitfalls of such a project. In 1816 Congress began its long search for a code of laws for the District of Columbia, by directing the judges and the attorney for the District to prepare one. Justice Story's measure in 1820 proposed to revise and embody in one act various penal laws of the United States. Yet the criminal law did not even make piecemeal progress. After the act of 1825, the Presidents were repeatedly forced to point out great gaps.<sup>14</sup>

Edward Livingston, who as a member of the House and Senate took part constantly in measures for penal reform, revision, and codification of the criminal law, prepared a code of criminal law for Louisiana. He introduced such a code both in the House and later in the Senate. Though not adopted either in Louisiana or by Congress, it brought him immediate distinction and international fame. He became an associate of the Institute of France and

<sup>13</sup> Livingston to Bentham, Bowring, *Works of Jeremy Bentham* (1843), XI, 51; Warren, *History of the American Bar* (1913), 508 *et seq.*; Ann. Cong., V, 144; XXIV, 1236; Madison, Message of Dec. 3, 1816, Richardson, *op. cit.*, I, 573, 576-577.

<sup>14</sup> Am. St. Papers, Misc., I, 21, 25; Randolph to Washington, Jan. 21, 1792, Washington Papers, CCLIII, No. 244-245, Lib. Cong.; Story, Ann. Cong., XXXV, 566; Jackson, Jan. 17, 1837, Register of Debates, XIII, 1412; Cong. Globe, IV, 123; Taylor, Dec. 4, 1849, Richardson, *op. cit.*, V, 9, 12.

was hailed by Sir Henry Maine as "the first legal genius of modern times."<sup>18</sup>

The federal laws were regularly published only in the newspapers, although occasional collections of existing statutes were printed. The first edition of the Statutes at Large was authorized in 1845 by contract with "Messieurs Little and Brown" who had proposed the project with the aid of Justice Story and predicted that it would become the national code.<sup>19</sup> Here, however, the statutes were published merely as they were enacted, without attempt at systematic restatement or the elimination of obsolete or repealed matter.

In 1850 Attorney General Crittenden circularized the district attorneys for recommendations as to the federal criminal laws, and in 1851 President Fillmore, calling attention to the inaccessibility and uncertainty of the accumulated criminal legislation of more than sixty years, recommended a commission to revise the public statutes. Three years before, a bill had been introduced in the House to provide for the "revision, consolidation, and methodical arrangement" of all the laws of the United States, both civil and criminal. Henceforth, the fortune of the criminal law was to be combined with the project for the codification of all the laws. Measures were constantly proposed in Congress and culminated in the Revised Statutes authorized in 1866 and published in 1875. Publication in newspapers at government expense ceased.<sup>20</sup>

Meanwhile, the actual enforcement of the criminal laws received only desultory attention from Washington. "They seem to have forgotten that such a thing as internal police or organization is necessary," Justice Story had accused Congress. "I believe in my

<sup>18</sup> Ann. Cong., V, 144 (1795); Cong. Debates, VII, 343 (1831); Senate Jr. 21 Cong. 2 Sess., 228 (1830); *A System of Penal Law*, House Doc. (1828); *Abolishing Punishment of Death*, Senate Doc., II, No. 75 (1831); Moore, *The Livingston Code*, 19 J. Crim. L. 344 (1928); Hunt, *Life of Edward Livingston* (1864), Chs. XII, XIII and p. 382; *Cambridge Essays* (1856), 17.

<sup>19</sup> 5 Stat. 798, Mar. 3, 1845; 1 Stat. dedication, advertisement, preface and letters to publisher and editor, i-xvi; Cong. Globe, XIII, 340; XV, 383, 1064, 1115, 1116, 1210; XVIII, 540; see *United States Laws 1789-1836*, edited by Sharswood "under the inspection of Joseph Story."

<sup>20</sup> See letters from dist. attys., A. G. Mss. 1850; Richardson, *op. cit.*, V, 113, 135-136; 14 Stat. 74, June 27, 1866; 18 Stat. 113, 115, 293, June 20, 1874.

conscience many members imagine that the laws will execute themselves." <sup>18</sup> The Presidents, usually through their Attorneys General, dealt with some of the policies and details of particular criminal cases when pressed to do so; but the criminal law enforcement remained the province of the scattered district attorneys, each acting as he saw fit.

When the numerous attempts to organize a department of law reached fulfillment in 1870, the Attorneys General at the head of the new Department of Justice immediately turned their attention to the criminal law. This was something new in Anglo-American national affairs; in England the great law officers seldom concerned themselves with criminal cases, and there the Home Secretary is still responsible for the administration of criminal justice.<sup>19</sup>

There began the slow process of reform, reorganization, supervision of the officers of the courts—the clerks, marshals, and attorneys—and the development of methods and personnel for the detection of offenses against the laws. The system of private prosecution of public offenders and the reward of informers by turning over to them the fines collected—historical hangovers in English law—had never been popular in the federal government, though they persisted in England.<sup>20</sup>

Equality before the law was the tenor of the first instructions. "The criminal Court House should not be used only for the punishment of the obscure," admonished Attorney General Brewster in 1882. "It must not be the poor man's Court House." Fair play in the court room came next. "Every man should be vigorously defended so that the law should not be strained or he be convicted by an omission to protect him in his rights," he declared. "While on the other hand those who prosecute must prosecute vigorously." If those accused were not guilty, or if there was "even a doubt," they should be acquitted.

Yet limited funds and personnel extended the problem beyond ethics. "I do not want arrests so multiplied that you will not be able

<sup>18</sup> Story, *op. cit.*, I, 244.

<sup>19</sup> Ch. II, *supra*; Howard, *op. cit.*, 25-32.

<sup>20</sup> Stephen, *op. cit.*, I, 419, 493-499, 501-503; Kenny, *op. cit.*, 6-8; National Commission on Law Observance and Enforcement, *Report on Prosecution* (1931), 6-7.

to fully and carefully prepare the cases," Attorney General Devens had been forced to direct in 1878. "We must not by endeavoring to convict too many, deprive ourselves of the means of convicting those who might be brought to justice." At Washington the Attorneys General handled all correspondence themselves, and half a century was to elapse after the formal creation of the Department of Justice before a division was set up for the supervision of the administration of the federal criminal law.<sup>21</sup>

The new Revised Statutes had been printed only a few years when in 1883, Attorney General Brewster, recommending a list of necessary changes, called attention to the need of simplified procedure and trials shorn of the technical objections and numberless dilatory motions that prevented speedy trial. "In preparing indictments for offenses against the United States, it is found necessary to follow the common-law forms of the last century, with all the technicalities," he said, "wholly unintelligible to the defendant who is called upon to answer, or to the jury selected to try the case." In 1889 Attorney General Miller circularized the trial judges and again proposed an extended list of specific reforms in the procedure and substance of the criminal law. In 1896 Attorney General Harmon described the method of legislation as the root of the difficulty—in that where there were laws, they had been made for special cases and were conflicting.<sup>22</sup>

Aside from these extensive lists of defects discovered in practical administration, from 1870 to the present day it has been constantly necessary to repeat particular recommendations respecting such elementary matters as the elimination of the grand jury in petty cases,<sup>23</sup> qualifications of grand jurors,<sup>24</sup> the procedure, jurisdiction, and the appearance of public officers before grand juries,<sup>25</sup> simplification of

<sup>21</sup> Instr. Bks. B-1, 654; L, 387, 427, 434; H, 385; Ann. Reps. Atty. Gen. 1919, 75; 1922, 90-91; 1925, 81; 1927, 47; see Cummings, *The State v. Harold Israel* (1924), 15 J. Crim. L. 406, 415; and see National Commission on Law Observance and Enforcement, *op. cit.*, 9, 11, 18, 20, and Howard, *op. cit.*, 396 *et seq.*

<sup>22</sup> Ann. Reps. Atty. Gen. 1883, 23-30; 1884, 17-25; 1885, 16-22; 1886, 11; 1887, 10; 1889, 20; 1896, 17.

<sup>23</sup> *Id.*, 1873, 18; 1874, 18; 1910, 77; 1912, 62; 1931, 2, 11; 1932, 6, 11.

<sup>24</sup> *Id.*, 1931, 3; 1933, 5.

<sup>25</sup> *Id.*, 1909, 21; 1910, 75; 1912, 60, 62; 1914, 7; 1915, 12; 1916, 11; 1917, 12; 1918, 11; 1919, 2; 1920, 2; 1921, 1; 1922, 2; 1923, 2; 1924, 3; 1925, 3; 1926, 2; 1927, 3; 1928, 1; 1929, 1; 1933, 78.

the surprisingly complicated procedure which treats the removal of an accused person from one judicial district to another—often within the same state—as though it were more serious than foreign extradition,<sup>20</sup> witnesses and evidence,<sup>21</sup> trial jurors,<sup>22</sup> penal bonds,<sup>23</sup> collection of costs and fines,<sup>24</sup> service of criminal process on corporations,<sup>25</sup> search warrants,<sup>26</sup> allowing the government the opportunity to appeal and secure the decision of the Supreme Court in criminal cases where trial courts refused to proceed upon indictments,<sup>27</sup> crimes on lakes,<sup>28</sup> criminal contempts,<sup>29</sup> crimes relating to insecticides and foods and drugs,<sup>30</sup> attempts to commit crimes,<sup>31</sup> threatening letters,<sup>32</sup> and the degrees of murder.<sup>33</sup>

The commissioners who had prepared the drafts which became the Revised Statutes of 1874 had been obliged to expend a considerable part of their time, as they put it, in learning the art; and the project had given the House of Representatives a new and experienced committee on revision of the laws. The next half-century brought forth new editions and supplements to the revision of 1874, then to be followed by the weary process of study, proposals, debates, reports, and legislation before another code was printed.<sup>34</sup>

In 1897 another commission was authorized to revise and codify the criminal and penal laws and report to Congress through the Attorney General. Its duties were soon extended beyond the criminal law, to the preparation of territorial codes and the codification of statutes relating to the jurisdiction and practice of the courts and then

<sup>20</sup> *Id.*, 1870, 4; 1871, 8; 1904, 4; 1905, 6; 1906, 3; 1907, 5; 1908, 10; 1909, 20; 1912, 61; 1914, 8; 1915, 8; 1916, 8; 1917, 8; 1918, 7; 1919, 1; 1920, 1; 1925, 4; 1926, 2; 1927, 1; 1928, 1; 1933, 1.

<sup>21</sup> *Id.*, 1878, 13; 1879, 14; 1909, 22; 1910, 78; 1911, 84; 1912, 61; 1925, 3; 1926, 1; and see Public 734, 74 Cong. 2 Sess., June 20, 1936, and Cummings to Roosevelt, June 20, 1936, D. J. File 235881.

<sup>22</sup> Ann. Rep. Atty. Gen. 1908, 14.

<sup>23</sup> *Id.*, 1925, 4.

<sup>24</sup> *Id.*, 1870, 4; 1871, 8.

<sup>25</sup> *Id.*, 1910, 76.

<sup>26</sup> *Id.*, 1908, 10; 1909, 23; 1910, 78; 1911, 84; 1912, 61; 1914, 7; 1916, 21.

<sup>27</sup> *Id.*, 1892, 24; 1893, 25; 1894, 29; 1895, 12; 1896, 15, 18; 1899, 33; 1900, 40; 1903, 6; 1905, 10; 1906, 4; 1907, 4; 1908, 4; 1909, 20; 1912, 61.

<sup>28</sup> *Id.*, 1887, 16.

<sup>29</sup> *Id.*, 1926, 4.

<sup>30</sup> *Id.*, 1914, 9.

<sup>31</sup> *Id.*, 1920, 3; 1921, 2; 1922, 2; 1923, 2; 1924, 3.

<sup>32</sup> *Id.*, 1915, 12; 1916, 11; 1917, 11; 1918, 10; 1919, 2; 1920, 2; 1921, 1; 1922, 1; 1923, 2; 1924, 2.

<sup>33</sup> *Id.*, 1891, 23; 1892, 22; 1893, 25; 1894, 29; 1896, 17.

<sup>34</sup> Cong. Globe, 40 Cong. 2 Sess., 91, 3504, 4495; edition of 1878, 19 Stat. 268, Mar. 2, 1877; supplements, 21 Stat. 308, June 7, 1880, 26 Stat. 50, April 9, 1890, and 27 Stat. 477, Feb. 27, 1893.

to all the permanent laws."<sup>41</sup> The commission made and the Attorney General transmitted numerous reports."<sup>42</sup> After nine years some Congressmen wished to get rid of the "whole business" and thought it likely to continue "useless and expensive" for years to come. The life of the commission was terminated, and its papers turned over to the Attorney General."<sup>43</sup>

A joint committee of Congress took up the work."<sup>44</sup> A "criminal code" was adopted in 1909."<sup>45</sup> Two years later part of the codification of statutes relating to the courts was enacted as a "judicial code."<sup>46</sup> There were sporadic attempts to complete the project, finally merging with proposals for a new codification of the whole statutory law."<sup>47</sup> The House committee repeatedly secured approval of measures revising and codifying the law, and each time the Senate refused to concur."<sup>48</sup> Finally codification by committees of Congress or special commissions was abandoned. Congress agreed to submit the work to private publishing companies for editing, and in 1928 the United States Code was adopted."<sup>49</sup> The fragmentary criminal statutes again became a part of the general code of laws of the United States.

Despite the high hopes and the attractive theories of earlier days, "codification" and "revision" of laws in America had come to mean little more than assembling existing statutes, throwing out those specifically repealed, and removing some of the obvious inconsis-

<sup>41</sup> 30 Stat. 58, 643, 1116, 1253, 1800, June 4, 1897, May 31, 1898, July 1, 1898, Mar. 3, 1899; 31 Stat. 494, 1181, June 6, 1900, Mar. 3, 1901; 33 Stat. 1285, Mar. 3, 1905.

<sup>42</sup> Ann. Repts. Atty. Gen. 1897, 18; 1899, 34; 1898, 29; 1900, 39; 1901, 33; 1902, 22; 1903, 7, 33; 1904, 51; 1905, 51; 1906, 40; Sen. Doc. 49, 56 Cong. 1 Sess. (1899); Cong. Rec., XXXVI, 289, 291 (1902); House Doc. 162 57 Cong. 2 Sess. (1902); *Final Report of Commission to Revise and Codify the Laws* (1906).

<sup>43</sup> Cong. Rec., XL, Pt. 8, 8000, 8732, 9010, 9088; 34 Stat. 754, June 30, 1906.

<sup>44</sup> Cong. Rec., XL, 7972, 7978, 8000, 8732, 8771, 9010, 9088, 9173; XLI, 436, 450, 698-702, 3005, 4256, 4347, 4348, 4629; House Rep. 6203, 59 Cong. 2 Sess. (1907); 34 Stat. 1423, Mar. 2, 1907; 35 Stat. 1169, Mar. 4, 1909.

<sup>45</sup> Sen. Doc. 741 and House Rep. 2270, 60 Cong. 2 Sess.; 35 Stat. 1088, Mar. 4, 1909.

<sup>46</sup> 36 Stat. 1087, Mar. 3, 1911.

<sup>47</sup> Cong. Rec., LI, 11073, 11605; LII, 227, 815, 4089, 4894, 4746; LIII, 135; LVII, 230; LVIII, 5668, 5788; LX, 475, 517, 571, 684, 1392, 4577, 4735; LIX, 4941.

<sup>48</sup> *Id.*, LVIII, 5668; LX, 574, 684, 1392; LXI, 87, 1443, 1477, 3056; LXIV, 896, 1212, 1777, 2084, 2090, 2507, 2846, 3137, 3265, 4194, 4546, 5019, 5087, 5438, 5446; LXV, 26, 475, 638, 643, 992, 1995, 2474, 10245, 10417.

<sup>49</sup> 44 Stat., Pt. 2, 777 and 778, June 30, 1926, and 44 Stat., Pt. 1; 45 Stat. 1007 and 1540, May 29, 1928 and Mar. 2, 1929; 47 Stat. 1349 and 1428, Feb. 28 and Mar. 3, 1933; 48 Stat. 948 and 1024, June 13 and 19, 1934.



encies."<sup>10</sup> The hit-or-miss nature of the building of a federal criminal law made some revision or correction necessary—a process which was destined to continue. Codification, mingled with diverse proposals for reforms of procedure, punishments and prisons, had held attention but naturally enough had not reduced the law to simple or final form.

Moreover the federal criminal law was limited in purpose to the protection of federal property and restricted federal functions. Accordingly, the specific statutes related merely to a few classes of offenses—postal, revenue, coinage, transportation (including such matters as shipment of explosives, thefts from interstate shipments, and fraudulent bills of lading), national and federal reserve bank matters, the existence and operation of government (including protection of public property and of officers while engaged in performing their duties), the franchise and civil rights (including the slave trade and peonage), interference with or corruption of judicial procedure, aliens and citizenship, bankruptcy, foreign affairs and neutrality, intoxicating liquors, patents and copyrights, and such miscellaneous matters as warehousing of agricultural products, interstate and foreign commerce in food and drugs, insecticides and fungicides, virus and serums or toxins, caustic poisons, "filled" milk, fruits, meats, importation of animal or insect pests, standards of fruit and vegetable containers as well as of seeds and grain, naval stores, birds and game, plant and animal quarantine, hours of labor on public works and interstate railroads, railway safety appliances, navigation and steamboat inspection, and disease quarantine.<sup>11</sup> This list, while inclusive, is necessarily general. For example, offenses and frauds against the government take various forms, as illustrated by the census frauds of 1911–1912 where the "booster" spirit led to the entering of thousands of fictitious names on the census rolls of some enterprising communities."<sup>12</sup>

<sup>10</sup> See Stephen, *op. cit.*, I, vii, x, 211, 212, 347, 359–360; and see Kenny, *op. cit.*, 544; compare Taft, *Administration of Criminal Law* (1905), 15 Yale L. J. 1, 16, and Arnold, *Law Enforcement* (1932), 42 Yale L. J. 1, 13–15.

<sup>11</sup> The statutes on each of these are too numerous to list here. Each annual report of the Attorney General discusses those that are currently important. See, for example, postal laws, Ann. Reps. Atty. Gen. 1903, 5; 1911, 25; 1912, 48; and revenue, *id.*, 1933, 54–55.

<sup>12</sup> *Id.*, 1911, 27–28; 1912, 36–37.

The policy and practice of a hundred and thirty years or more prior to the World War had left the punishment of common law crimes to the states. Indeed, there is a long and curious history of attempts by Congress to delegate to the state courts jurisdiction over the limited field of federal criminal statutes.<sup>88</sup> Following the World War, widespread lawlessness forced itself upon popular attention. The decade that followed was marked by more than fifty important crime "surveys" carried on by state, municipal, private and professional committees and commissions. Among their objects were the gathering of facts, the education of the public, the making of recommendations for legislation by state and local governments, and, in some cases, the surveillance over state and local prosecutors and police.<sup>89</sup>

Federal prohibition, which opened a lucrative field for the lawless, brought the federal government face to face with conditions unprecedented in scope. The Department of Justice and the Prohibition Bureau of the Treasury were confronted by the problems of apprehending offenders in every corner of the nation, of "rum runners" along the borders and coasts, and of congestion of federal courts and extra-legal devices for reducing their dockets. The situation became such that the federal government turned its attention to the revenue and customs laws as the basis of prosecutions for illegal liquor traffic, since these laws had been developing from the earliest days and carried adequate penalties which the courts had grown accustomed to impose upon offenders. Enforcement in the interior was left more and more to the efforts of states and counties, but some of these had no prohibition laws and none of them could cope with rampant violations.

Progress was reported by the Department of Justice as "interesting if not encouraging" and the law as "unsettled and unsatisfac-

<sup>88</sup> See Warren, *Federal Criminal Laws and the State Courts* (1925), 38 Harv. L. Rev. 545.

<sup>89</sup> Morse and Moley, *Crime Commissions as Aids in the Legal-Social Field* (1929), 145 Ann. Am. Acad. Pol. & Soc. Sci. 68; Pfiffner, *The Activities and Results of Crime Surveys* (1929), 23 Am. Pol. Sci. Rev. 930; Wigmore, *The National Crime Commission* (1925), 16 J. Crim. L. 312; Conner, *Crime Commissions and Criminal Procedure* (1930), 21 *id.* 129; Cass, *National Crime Commission Conference* (1928), 18 *id.* 497; Miller, *Activities of Bar Associations and Legislatures in Connection With Criminal Law Reform* (1927), 18 *id.* 378.

tory." Enforcement became a race with liquor smugglers who were continually developing ingenious methods for illegal traffic on an increasing scale. There were conferences and arrangements with foreign powers. The federal government was, in the words of one annual report of the Prohibition Division of the Department of Justice, "not without embarrassment caused by some State and municipal officers who, under color of their office, are actively violating the laws themselves."

Public opinion was changing, enforcement was proving impossible, and Congress was declining to face the costs. By 1932 Attorney General Mitchell pleaded that changes, if any, should be made as quickly as possible but not by leaving laws on the statute books and then scuttling them by refusal to appropriate money for their enforcement. "Nothing can be imagined," he declared, "which would tend more to create disrespect than to leave criminal statutes in force but relax the effort to enforce them." <sup>88</sup>

Meanwhile, President Hoover recommended that Congress authorize the appointment of a national commission "for a searching investigation of the whole structure of our Federal system of jurisprudence." Congress responded and the judges approved.<sup>89</sup> Aside from reports on federal prohibition and recommendations for reforms in the judicial system to dispose of the staggering load of liquor cases,<sup>90</sup> the National Commission on Law Observance and Enforcement, of which former Attorney General Wickersham was chairman and which soon became known as the "Wickersham Commission," made only three other reports on federal justice, "Enforcement of Deportation Laws," "The Child Offender," and "The Federal Courts." Nine other reports or studies almost wholly concerned with state justice, "Criminal Statistics," "Prosecution," "Criminal Pro-

<sup>88</sup> Ann. Reps. Atty. Gen. 1922, 82, 84; 1923, 85, 86, 88; 1924, 79; 1925, 38; 39; 1926, 53, 55, 57, 60; 1927, 31; 1928, 35; 1930, 1-2, 36; 1932, 4.

<sup>89</sup> Cong. Rec., LXXI, 4-5, 417, 3100; LXII, 27, 1501; see letters exchanged between Hoover and Borah, *New York Times*, Feb. 10 and 24, 1928; 45 Stat. 1613, Mar. 4, 1929 and 46 Stat. 862, July 3, 1930; statement by Judicial Conference, Ann. Rep. Atty. Gen. 1929, 7.

<sup>90</sup> *Proposals to Improve Enforcement of Criminal Laws of the United States* (1930), House Doc. 252, 71 Cong. 2 Sess., 5-25; National Commission on Law Observance and Enforcement, *Report on the Enforcement of the Prohibition Laws of the United States* (1931).

cedure," "Penal Institutions, Probation and Parole," "Crime and the Foreign Born," "Lawlessness in Law Enforcement" (the "third degree"), "Police," "Cost of Crime," and "Causes of Crime," were published in 1931.

"Criminology is remaking, the social sciences are in transition, and the foundations of behavior are in dispute," said the commission. "To reach conclusions of any value, we must go into deep questions of public opinion and the criminal law," they continued. "We must bear in mind the Puritan's objection to administration; the Whig tradition of a 'right to revolution'; the conception of natural rights, classical in our polity; the democratic tradition of individual participation in sovereignty; the attitude of the business world toward local regulation of enterprise; the clash of organized interests and opinions in a diversified community; and the divergences of attitude in different sections of the country and as between different groups in the same locality." Furthermore, they concluded, "We must not forget the many historical examples of large-scale public disregard of laws in our past." \*\*

Again the "technicalities" and "loopholes" of the law, "its circumlocutions, its involved procedures," and the "disordered condition of Federal legislation" loomed large in the view of the President. The commission proposed a code of federal criminal procedure. Attorney General Mitchell recommended and secured legislation reorganizing the administration of federal prisons and authorizing the Supreme Court to prescribe rules of practice and procedure in federal cases after verdict.

Reform of procedure, however, was old straw. In its report on criminal procedure the commission pointed out that archaic procedure properly administered produced better results than feeble administration of a modern procedure. "Improvement in the mode of choice and tenure of judges, prosecutors, and officials connected with enforcement of law through the courts, and working out of better administrative methods," it reported, "must be given relatively

\*\* *Report on the Causes of Crime* (1931), vii; *Proposals to Improve Enforcement of Criminal Laws* (1930), House Doc. 252, 71 Cong. 2 Sess., 6.

greater stress in a program of improvement than reform of procedure." <sup>80</sup>

It pointed out that the liquor problem "transcends State lines" and that there would always be need of strong federal organization. With respect to crime generally and the condition of local enforcement, it noted as "significant" the extensions and attempted extensions of the federal criminal laws, and it recommended thorough nation-wide and scientific studies of racketeering, organized extortion, and commercialized fraud.<sup>80</sup> Attorney General Mitchell, however, believed that it had never been contemplated that the "whole task" of enforcing prohibition should be borne by the federal government or that the American people would tolerate the organization of a federal police force adequate to prevent violations of the law "locally as well as nationally."

"Dealing with organized crime," said he, "is largely a local problem." He noted that criminals committed ten violations of state law to one violation of a federal statute. "But the fact that these criminal gangs incidentally violate some federal statute does not place the primary duty and responsibility of punishing them upon the Federal Government, and until state police and magistrates, stimulated by public opinion, take hold of this problem, it will not be solved." <sup>81</sup>

Overnight the whole public policy respecting the federal criminal law was challenged when the kidnapping of the child of the prominent Lindbergh couple climaxed an alarming growth of lawlessness and the appearance of a new type of ruthless criminal "gangster."

<sup>80</sup> *Id.*, 7, 8, 12, 13; *Report on Lawlessness in Law Enforcement* (1931), 1, 8; *Report on Criminal Procedure* (1931), 2, 3. *Rules of procedure after verdict*: Ann. Reps. Atty. Gen. 1931, 1; 1932, 6, 11; 1933, 5; 47 Stat. 904, Feb. 24, 1933; 48 Stat. 399, Mar. 8, 1934; Chief Justice, Hoover, Roosevelt, and Chairman House Jud. Comm. to and from Mitchell and Cummings, Mar. 1, 1932, Feb. 24, 1933, Jan. 11, 16 and Mar. 8, 1934, D. J. File 123106.

<sup>80</sup> *Report on Prohibition* (1931), 125; *Report on Prosecution* (1931), 16; *Report on the Cost of Crime* (1931), 7; see Hearings before Sen. Subcomm. on Comm., 74 Cong. 2 Sess., *Investigation of So-Called "Rackets"* (1933), and *Digest of Hearings*, Sen. Subcomm. on Comm., *Crime and Crime Control* (1934).

<sup>81</sup> *Proposals to Improve Enforcement of Criminal Laws* (1930), House Doc. 252, 71 Cong. 2 Sess., 5; Address before the Law School Assn. of the Univ. of Minn., April 15, 1931, D. J. File 44-06-4; Address in the National Radio Forum, Columbia Broadcasting System, May 13, 1931, D. J. File 44-06-4; Ann. Rep. Atty. Gen. 1932, 4, and compare *id.*, 1922, 91.

Public sentiment and the policy of a hundred years were ripe for change. On June 22, 1932, President Hoover approved the first federal kidnaping statute, penalizing the transportation across the national borders or state lines of any person "unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away . . . and held for ransom or reward." \*\*

In Congress constitutional objections had been raised. Attorney General Mitchell had previously opposed such a measure because of the limited detective service of the United States, congestion of federal courts, and his belief that the responsibility for curbing such offenses rested primarily on the states. In the House the main objection was states' rights and a reluctance to share responsibility with the states in the field of criminal law.

"If this law had been on the statute books at the time the Lindbergh case arose, there would have been an outcry demanding that the federal government take hold of the case; the local police authorities would have relaxed their activities and been glad to dump the responsibilities on the federal government; we would have spent thousands of dollars with no better results than the state authorities obtained, only to find out at the end that no federal crime had been committed as there had been no interstate transportation," wrote Attorney General Mitchell to the President when the measure had passed. "Indeed, in every kidnaping case that may arise, until the crime is solved no one knows whether there is any interstate transportation justifying interference by the federal government." Yet he recommended that the President sign it. "Congress is very largely in favor of it and I do not believe the veto power should be resorted to in situations of this kind." \*\*

On prior occasions Congress had passed a few measures making

\*\* 47 Stat. 326, June 22, 1932; 48 Stat. 781, May 18, 1934; Public 424, 74 Cong. 2 Sess., Jan. 24, 1936; Ann. Reps. Atty. Gen. 1933, 105; 1935, 138.

\*\* Mitchell to Cochran, Sumners, and Hoover, Oct. 15, 1930, Jan. 18, 1932, June 21, 1932, D. J. File 109-01; Cong. Rec., LXXV, 12318, 13283, 13284, 13287, 13289-13293, 13299, 13304; constitutionality challenged on the authority of the *Schechter* case but certiorari denied by Supreme Court, *Gooch v. U. S.*, 56 S. Ct. 683 (1936). Two years earlier Attorney General Mitchell had made objections to a federal stolen property act, on grounds of policy, Mitchell to Sen. Norris, Mar. 25, 1930, D. J. File 122-01.

moral dereliction a federal crime. In 1909 the Supreme Court had held unconstitutional part of an act making illegal the keeping of alien women and girls in houses of prostitution. Congress responded in 1910 with a statute, commonly known as "The Mann Act," prohibiting interstate or foreign transportation of women and girls for immoral purposes. It passed and was signed by President Taft over vigorous constitutional objections that it was an illegal violation of states' rights and state police power. Attorney General Wickersham immediately created a special organization of agents and entered upon a vigorous program of enforcement.\*\*

In 1913, over strenuous objections that "the right to travel in interstate commerce is a fundamental principle, regardless of moral or immoral intent of the traveler at the end of the journey" and that the statute conflicted with the reserved powers of the states, the Supreme Court found the act constitutional. "There is a domain which the States cannot reach," wrote Justice McKenna for the Court. "We are one people; and the powers reserved to the States and those conferred on the Nation are adopted to be exercised . . . to promote the general welfare, material and moral." \*\*

In 1919 Congress enacted a law to punish the transportation of stolen motor vehicles in interstate or foreign commerce. This legislation also was challenged before the Supreme Court. Prior decisions, it was argued, "went to the very extreme limit." Chief Justice Taft, who as President had approved the White Slavery Act, wrote the opinion for the Court. "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin," he pointed out. "It is known of all men that the radical change in transportation of persons and goods effected by the introduction of the automobile, the speed with which it moves, and the ease with which evil-minded persons can avoid capture, have greatly encouraged and increased crimes." There were other in-

\*\* 36 Stat. 825, June 25, 1910; Cong. Rec., XLV, 805-823, 1030-1041, App. 11-15; House Rep. 47 and Senate Rep. 886, 61 Cong. 2 Sess.

\*\* *Hoke v. U. S.*, 227 U. S. 308, 310, 311, 321, 322 (1913).

stances where similar legislation had been found constitutional by the courts. This statute, too, was held to be a proper exercise of federal power."<sup>66</sup>

With such a legal background, proposals for federal legislation in the crime crisis following the post-war decade could not be met with serious charges of unconstitutionality. The question was solely one of policy and necessity. After the change of administration in 1933, the constitutional amendment upon which the federal prohibition laws rested was repealed. In its wake there remained the criminal elements tutored in methods born of the liquor traffic and hungry for new fields of lucrative crime. A new Attorney General proposed a definite program and submitted a series of enactments."<sup>67</sup> Congress responded with a series of statutes covering—where the control of the mails, interstate commerce, or other federal powers were involved—various forms of racketeering and extortion," receiving and passing ransom money," transportation of stolen property valued at \$5000 or more, and robbery of Federal Reserve System banks."<sup>68</sup>

Traffic in firearms was regulated,"<sup>69</sup> funds for rewards were supplied,"<sup>70</sup> special agents were for the first time given powers of arrest and the right to carry arms, resistance to the performance of the duties of agents and marshals and acts leading to their injury or

<sup>66</sup> 41 Stat 324, Oct 29, 1919, Cong Rec, LVIII, 5470-5478, 6433-6435, *Brooks v U S* 267 U S 432, 434, 436, 438 (1925) Federal power had been unsuccessfully challenged in *Weber v Freed*, 239 U S 325 (1915) (prize fight pictures), *Clark Distilling Co v Western Md Ry Co*, 242 U S 311 (1917) (intoxicating liquors), *Hipolite Egg Co v U S* 220 U S 45 (1911) (adulterated food), *Lottery Case*, 188 U S 321 (1903) (lottery tickets), *Reid v Colorado* 187 U S 137 (1902) (diseased live stock), *U S v Popper*, 98 Fed 423 (1899) and *Clark v U S*, 211 Fed 916 (1914) (obscene literature)

<sup>67</sup> Ann Repts Atty Gen 1933, 1, 1934, 1, 61-75, 124-132, 1035, 56-69, for a list of statutes, see Cummings, *Progress toward a Modern Administration of Criminal Justice in the United States* (1936), 22 ABA J 345-346 n 1 Homer Cummings (1870- ) was born in Chicago, Illinois, attended Yale University and Yale Law School, was admitted to the Connecticut bar and practiced at Stamford, became mayor and later corporation counsel, state's attorney, and then Attorney General of the United States (1933- )

<sup>68</sup> 48 Stat 979, June 18, 1934, 48 Stat 781, May 18, 1934, 49 Stat 427, June 28, 1935, amending 47 Stat 649, July 8, 1932, Ann Rep Atty Gen 1935, 139.

<sup>69</sup> Public 424, 74 Cong 2 Sess, Jan 24, 1936

<sup>70</sup> 48 Stat 783, May 18, 1934, 48 Stat 794 May 22, 1934, 49 Stat 684, Secs 316, 333, Aug 23, 1935, Ann Rep Atty Gen 1935, 141

<sup>71</sup> 48 Stat 1236, June 26, 1934, Public 490, April 10, 1936, Ann Rep Atty Gen 1935, 2 See 44 Stat 1059, Feb 8, 1927

<sup>72</sup> 48 Stat 910, June 6, 1934, Public 599, 74 Cong 2 Sess, May 15, 1936



death were made criminal," the procedure of federal courts was revised in some respects to prevent the escape of offenders through technicalities," witnesses and offenders were forbidden to travel in interstate or foreign commerce to escape prosecution or the giving of evidence under state laws," the so-called Lindbergh kidnaping statute was amended, broadened, and strengthened, and the states were authorized to enter compacts for mutual cooperation in the prevention of crime and in the enforcement of their respective criminal laws and policies "

Dense population and the improvement of firearms and means of transportation and communication had enabled wrongdoers to play hide-and-seek with local authorities of states, counties, and cities "Between Federal and State jurisdiction there existed a kind of twilight zone, a sort of neutral corridor, unpoliced and unprotected, in which criminals of the most desperate character found an area of relative safety," said the Attorney General "It was the unholy sanctuary of predatory vice " " It was this area that the officers of the United States, armed with these new statutes, sought to police The major purpose was to supplement and not to supplant the authority of the states By developing a more intimate cooperation all arms of government, federal, state and local, would be strengthened "

The Attorney General placed his program before the public in a series of addresses by radio and before professional, scientific, and other gatherings In 1934, he convened a conference of six hundred representatives of states, municipalities, and professional organizations to speed the development of a structure and a technique predicated upon cooperation with state and local agencies so that the Department of Justice could be made "a nerve cen-

<sup>13</sup> 48 Stat 780 May 18, 1934 48 Stat 1008 June 18, 1934, 49 Stat 377, June 15, 1935, Public 431, 74 Cong 2 Sess Feb 8, 1936

<sup>14</sup> 48 Stat 648 April 30 1934, 48 Stat 772, May 10, 1934 See 48 Stat 58, May 18 1933, 47 Stat 380, June 29, 1932

<sup>15</sup> 48 Stat 782, May 18, 1934

<sup>16</sup> 48 Stat 909, June 6, 1934

<sup>17</sup> Cummings, *Progress Toward a Modern Administration of Criminal Justice in the United States* op cit, Cummings *Lessons of the Crime Conference* (1934), Proc Atty Gen Conf on Crime (1934), 456

<sup>18</sup> Ann Repts Atty Gen 1922, 91, 1933, 78-79, Cummings, op cit, 4, and *Progress toward a Modern Administration of Criminal Justice*, op cit

ter of helpful impulses and a clearing house of useful information." "

The central identification division or, as more popularly known, the "finger print" facilities of the Department of Justice continued to expand and become increasingly useful." A model crime laboratory, making available scientific process to all police, was installed in the Bureau of Investigation." Since 1932 the bureau had published a monthly bulletin of "Fugitives Wanted by Police," giving information regarding flagrant offenders against state and federal laws and instruction in practical crime detection." It had also begun the collection of reliable crime statistics, which Congress had first unsuccessfully directed the Attorney General to secure in 1870 and which, in the words of the Wickersham Commission, are "the beginning of wisdom" in the criminal field." New equipment was installed and the personnel increased.

These beginnings, together with the reorganization and development of the prison system," were pressed forward vigorously. With the cooperation of the International Association of Chiefs of Police, the training schools for federal agents were opened to selected groups of state and local peace officers." The Federal Bureau of Investigation caught the popular fancy after a series of successes in kidnapping cases. The depredations of organized interstate gangs

" Cummings, *ibid.*, and, among others, *Predatory Crime, The Recurring Problem of Crime, The Campaign Against Crime, Law Enforcement, How the Government Battles Organized Lawlessness, Lessons of the Lindbergh Case, The Menace of Organized Crime, The Government's Program to Fight Lawlessness, Progress in Dealing with Crime, Criminal Law Administration—Its Problems and Improvement, Progress Towards a National Program for the Prevention, Detection and Punishment of Crime, The Police Training School of the Department of Justice, and The Crime Problem at Home and Abroad*, all in D. J. File 44-4-1-1, Sp. Sec.

*Proceedings of the Attorney General's Conference on Crime* (1934), 6; *Attorney General's Conference on Crime* (1935), 21 A.B.A.J. 5, 9; Ann. Rep. Atty. Gen. 1933, 1-2.

" See Ch. XVIII *supra*, and Ann. Rep. Atty. Gen. 1933, 100.

" *Id.*, 1933, 98-99; see also National Commission on Law Observance and Enforcement, *Report on Prosecution*, 9.

" Ann. Rep. Atty. Gen. 1933, 99-100; and see National Commission on Law Observance and Enforcement, *Report on Police* (1931), 4, 5.

" Ann. Reps. Atty. Gen. 1870, 7; 1932, 104-105; National Commission on Law Observance and Enforcement, *Report on the Cost of Crime* (1931), 6; Robinson, *History of Criminal Statistics* (1908-1933), 24 J. Crim. L. 125, 130.

" Ch. XVII, *supra*; Ann. Rep. Atty. Gen. 1934, 155; National Commission on Law Observance and Enforcement, *Report on Prosecution* (1931), 5.

" Ann. Reps. Atty. Gen. 1934, 134; 1935, 1-2.

went into a sharp decline, and the whole program elicited widespread popular support.

The bewildering maze of release procedures whereby those convicted of crime were given suspended sentences or were pardoned or paroled could not be overlooked. Traditionally, the Presidents had turned to their Attorneys General for advice in the exercise of the pardoning power, and had prescribed fixed rules for the guidance of the Attorney General and the Pardon Attorney of the Department of Justice.<sup>80</sup> The federal parole and "good behavior" laws had been slowly developed,<sup>81</sup> and the judicial suspension of sentences had been limited and "probationers" supervised.<sup>82</sup> In the states, however, there existed no uniform system, and from the earliest days the several systems of release had all too frequently been a haven for criminals and local politics as well as a delusively simple method of caring for overcrowded prisons.<sup>83</sup> In 1935 a nation-wide investigation was initiated in order that law officers engaged in criminal work might "come to grips with the vexing problem."<sup>84</sup>

Each of these points in the cooperative program, though capable of simple enumeration, involves administrative problems of no mean magnitude. There is no magic formula for the administration of criminal justice. In the urban, industrialized, and unified country of today attorneys general, prosecuting attorneys, police and public detective forces must enforce the law with machinery essentially unchanged from that set up for the typically rural community of a century ago. At the same time, again to use the words of the Wickersham Commission, these law officers have "much more power over the administration of criminal justice than the judges."<sup>85</sup>

<sup>80</sup> Cushing, *Office and Duties of Attorney General* (1854), 6 Op. 326, 349-350; 13 Stat. 516, Mar. 3, 1865; 26 Stat. 946, Mar. 3, 1891; Cleveland, Ex. Order, June 16, 1893; Ann. Reps. Atty. Gen. 1879, 17; 1899, 42; 1908, 8.

<sup>81</sup> Ch. XVII, *supra*; Ann. Rep. Atty. Gen. 1931, 11, 107-108.

<sup>82</sup> Instr. Bk. No. 3, 246; Ex. and Cong. Letter Bk. No. 2, 95; Ann. Rep. Atty. Gen. 1912, 62; D. J. File 4-5-5-2 and Circular 517 to Dist. Attys., Jan. 30, 1915; *Ex parte United States*, 242 U. S. 27 (1916); Ann. Rep. Atty. Gen. 1917, 91, 521; 43 Stat. 726, Jan. 7, 1925; 46 Stat. 503, June 6, 1930; 48 Stat. 256, June 16, 1932.

<sup>83</sup> Lewis, *The Development of American Prisons and Prison Customs* (1922), 38 *et seq.*, 57 *et seq.*, 60, 85, 116, 168.

<sup>84</sup> Dept. Justice Release, Jan. 7, 1936; Cummings, *Progress toward a Modern Administration of Criminal Justice*, *op. cit.*

<sup>85</sup> National Commission on Law Observance and Enforcement, *op. cit.*, 9, 11, 18, 20.

In 1936 the Attorney General supplemented this view. "All too often public officials are content merely to lecture the citizen for his alleged indifference to the duties which inhere in citizenship. This seems to me to be somewhat less than fair and an altogether too convenient escape from the responsibilities which rest upon the public officials themselves. Our people have placed such officials in key positions of power and trust, and have a right to expect that their high responsibilities will be faithfully and efficiently discharged.

"Our experience has shown that what might have appeared to be public indifference was, largely, the apathy of the disillusioned, resulting from the frequent failure of public authorities to supply the service and the type of leadership to which the American people are entitled. Once a reasonable course of action has been projected, and representatives of Federal, State and local interests have been brought together for concerted action, public opinion is inspiringly spontaneous in its support of the common objective." \*\*

\*\* Cummings, *op. cit.*

## CHAPTER XXIII

### THAT THE LAWS BE FAITHFULLY EXECUTED

DESPITE a tradition calling for a government of laws, men must not only draft the statutes but formulate judicial decisions and maintain the courts, discover and bring offenders to justice, defend the rights of individuals or of the public, and execute the orders, judgments, decrees, or sentences of the nation's tribunals and magistrates. Indeed, for these purposes men and laws do not suffice, for in modern society an organization, a system, and a tradition are indispensable.

The Constitution in simple language admonishes the President to "take Care that the Laws be faithfully executed." While he, in the words of Attorney General Cushing, is the chief functionary of the United States, it is of course physically impossible that he should do everything in person. The Constitution and the laws, therefore, give him agents through whom the executive business may be transacted.<sup>1</sup>

Even then, aside from some phases of governmental services—such as the post, the highways, the army and navy, and the conduct of foreign affairs—the federal laws are ultimately enforced or executed through the courts. True, the citizen may submit to the laws without appeal to these tribunals. True, also, administrative officers may be vested with some measure of discretion and authority. However, in controversies over public power and private right, there is a final appeal to the judicial department, both on the part of the citizen and on the part of the government.

Those who represent the public or their government before the courts must be skilled in legal procedure, or, to use the words of the Judiciary Act of 1789, "learned in the law." Such a specialized function in the execution of the laws is easily distinguishable and readily segregated from the general public administration. Accordingly, the First Congress provided not only for courts and for executive officers but also for district attorneys, marshals, and an Attorney

<sup>1</sup> Art. II, Secs. 2, 3; Cushing, *op. cit.*, 327, 341, 342.

General. Eighty years of practice, growth, and experimentation passed before, in 1870, these law officers were brought into a formal organization of their own, the Department of Justice. Meanwhile law officers had appeared in other departments, and these too were transferred to the new law department so that all the legal business of the United States might be given uniformity and efficient organization.

Another sixty years and more passed. What were the results of the legislative fiat of 1870? A mere statute could not create a Department of Justice. There were three immediate problems—inter-departmental relations, the supervision of field forces, and the development of a central organization.

All officers and agents of the United States are engaged in the execution of the laws. Each of them constantly requires legal counsel and advice and must in his official capacity either resort to the courts to compel compliance with the laws or must be defended in the courts at the suit of citizens who contest the application of the laws. Any department furnishing such legal services must therefore touch intimately not only the life of the citizen but also the functions and duties of all officers and agencies of the federal government.<sup>a</sup>

The readjustments contemplated by the Department of Justice Act were disregarded. The Solicitor of the Treasury, Solicitor of Internal Revenue, Solicitor of the Navy, and the law officer of the Department of State, all of whom had been transferred to the Attorney General's charge, remained housed with their respective departments where, as a practical matter, their relations were almost unchanged. This was due in part to lack of accommodations to house the whole of the new law department. Also, new "Solicitors of the Department of Justice" or "Assistant Attorneys General" were authorized for other departments, though their title ultimately became simply "Solicitor."<sup>b</sup>

At first the Attorney General formally authorized the appointment and dismissal of their clerks. Indeed, as late as 1925 this mis-

<sup>a</sup> See Beck, *World's Largest Law Office* (1924), 10 A.B.A.J. 340.

<sup>b</sup> Ann. Repts. Atty. Gen. 1870, 1, 5; 1872, 16; 1886, 269; 1891, 24; 1903, 7; 1913, 6; 37 Stat. 736, Sec. 7, Mar. 4, 1913 (Sol. Dept. Labor); 36 Stat. 1170, 1214, Mar. 4, 1911; 38 Stat. 454, 488, 494, July 16, 1914.

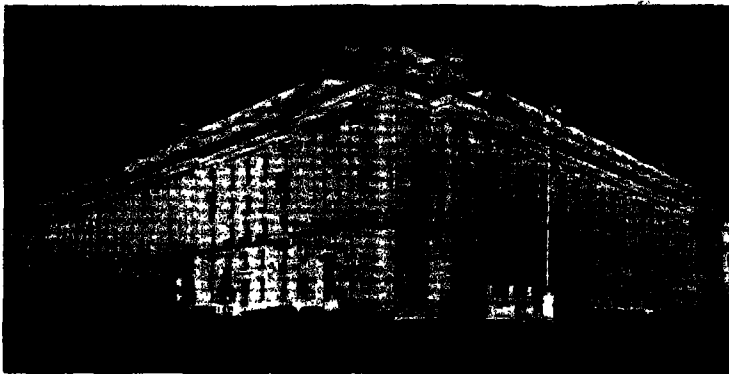
called "loose system of liaison" between the solicitors and the Attorney General continued to puzzle those who attempted to unravel the complicated lines of federal administration. Even nominally divided supervision of these officers by the departments in which they were stationed and by the Attorney General was avoided from the outset. Attorney General Williams in 1872 had requested Congress to remedy the confusion, but their subordination to the Attorney General remained only a legislative fiction, to be recognized as such occasionally in the correspondence of the next fifty years.<sup>4</sup>

The departments were also disposed to retain their former practice of supervision over district attorneys. Old statutes had not been expressly repealed and had found places in the Revised Statutes, the compilation of which had been authorized and begun before the creation of the Department of Justice. The officers of the Treasury, for example, continued to give instructions and request reports from district attorneys and marshals. Attorney General Akerman protested. Forty years later, in 1911, Attorney General Wickersham sought to end the conflict by issuing a circular which laid down the rules to govern the United States attorneys, and in 1916 Attorney General Gregory declined a Treasury request to modify a new issue of these regulations. Thereafter, while the officers of the Treasury continued to issue instructions, the district attorneys took them as suggestions or referred differences to the Department of Justice.<sup>5</sup>

When the local federal law officers finally came to be governed through their own cabinet officer, the Attorney General, other departments and agencies began to employ their own attorneys, thus avoiding the necessity of calling upon either the Attorney General or the district attorneys. It was just such multiplication of counsel that had moved Congress to establish a Department of Justice. The con-

<sup>4</sup> Ann. Reps. Atty. Gen. 1872, 16; 1873, 18; 1875, 6-7; 1886, 19; 1887, 22; 1888, 19; 1889, 17; 1890, 21; 1891, 9-10; 1907, 8; Ex. Order 6166, Sec. 7, June 10, 1933; 36 Stat. 294, April 9, 1910; House Hearings, *Department of Justice Appropriation*, 1923, 23-24, 27-33; *Reorganization of Executive Departments* (1924), House Doc. 356, 68 Cong. 1 Sess., 24; Atty. Gen. to Sec. Treas., Feb. 19, 1916, D. J. File 150929-163; Atty. Gen. to Sec. War, May 10, 1932, D. J. File 235098; Atty. Gen. to Sec. Int., Jan. 28, 1896, Ex. and Cong. Letter Bk. No. 25, 40.

<sup>5</sup> Gregory to McAdoo, Oct. 31, 1914, and July 28, 1916, D. J. File 44-3-16, Ann. Reps. Atty. Gen. 1926, 97; 1871, 5; Dist. Atty. to Commr. Int. Rev., Dec. 24, 1910, D. J. File 154480; Asst. Atty. Gen. to Dist. Atty., Feb. 24, 1928, D. J. File 44-3-16; Olney, 20 Op. 714 (1894).



It is interesting to recall that during the greater part of its 145 years of existence the legal department of the United States has been a governmental wanderer, with no local habitation of its own and, for more than half that period, without an authoritative name. The post of Attorney General was created by the Judiciary Act of September 24, 1789; but it was an office that was created, not a department. With the removal of the seat of government to Washington, the various departments were housed in nondescript buildings grouped about the President's house. No accommodations whatever were provided for the Attorney General. He was expected to furnish his own quarters, fuel, stationery and clerk. In 1822 the Attorney General was furnished with his first official quarters—one room on the second floor of the old War Department Building. There the office was maintained until 1839 when the Attorney General, whose staff now consisted of a clerk and a messenger, and who had acquired the nucleus of a library, moved into rooms located on the second floor of the Treasury Building. Sixteen years later the office was removed to its third home, a brick building on the southeast corner of Fifteenth and F Streets. Here it remained until 1861, when, upon the completion of the south wing of the Treasury, a suite of rooms was provided on the first floor of the new addition. Finally, after eighty-one years of existence, the office of the Attorney General had expanded to such an extent, both in functions and in personnel, that it became, in reality, one of the executive departments of the Government. In recognition of this fact, the Congress enacted the law of June 22, 1870, entitled "An Act to establish the Department of Justice." In 1871, the Attorney General leased for a period of ten years the second, third and fourth floors of the Freedmen's Bank Building on Pennsylvania Avenue. The Department remained there until 1899. The Attorney General and his personal staff then took up their abode in the Baltic Hotel on K Street, between Vermont Avenue and Fifteenth Street. The other members of the Department were distributed in various parts of the city; and the library was placed in the old Corcoran Art Gallery. After the lapse of several years, and to relieve an almost intolerable situation, the Attorney General leased the building at the northeast corner of Vermont Avenue and K Street. It proved to be so inadequate in size that it was necessary to secure space in seven additional buildings. I have indulged in this recital of the vicissitudes and wanderings of the Department of Justice that you may realize with what keen delight we, at last, take possession of our permanent home. Excerpts from the Address by Attorney General Homer Cummings at the Dedication of the Department of Justice Building, October 25, 1934.





gressional determination to eliminate duplicate legal service had been rephrased again and again throughout the Department of Justice Act. In addition to the transfer of the law officers of other departments to the Department of Justice, the officers of the new department were required to render "all" legal services for the government and authorized to conduct and argue "any" case in which the government was interested. The Attorney General was given the supervision of the conduct and proceedings not only of the district attorneys but also of "all other" attorneys and counselors employed in any federal cases or business. Finally, it was made unlawful for other federal agencies to employ counsel at the expense of the United States unless thereafter specially authorized by law, "and then only on certificate of the Attorney General" that such services actually had been rendered and could not be performed by the Department of Justice.\*

On two occasions, in 1918 and 1933, pursuant to further acts of Congress, the Presidents found it necessary to issue orders consolidating and concentrating in the Department of Justice the function of representing the government in the courts. In recent years the Attorneys General, also, were forced to turn attention from law enforcement to the vexed question of inter-departmental authority. They found again, as Cushing warned more than eighty years ago, that "want of due arrangement of public functionaries and their functions, is want of due responsibility to society and to the law." †

Indeed, not only the executive but the courts as well found it necessary to halt disintegration of responsibility for law enforcement in the tribunals of justice. "The Attorney General," says the Supreme Court, "is the hand of the President in taking care that the laws of the United States in the protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed." ‡ Indeed, some federal courts will not recognize

\* 16 Stat. 162, Secs. 3, 5, 7, 14, 16, 17, June 22, 1870.

† 40 Stat. 556, May 20, 1918; Ex. Order 2877, May 31, 1918; 47 Stat. 413, June 30, 1932, amended 47 Stat. 1489, 1517, Sec. 16, Mar. 3, 1933, and Ex. Order 6166, June 10, 1933. *U. S. v. Paramounts Publix Corporation*, 73 F. (2d) 103 (1934), Ann. Reps. Atty. Gen. 1926, 97; 1928, 1-2; 1929, 1; 1933, 1; Cushing, *op. cit.*, 346-347.

‡ *Ponzi v. Fessenden*, 258 U. S. 254, 262 (1922); *U. S. v. San Jacinto Tin Co.* 125 U. S. 273, 278-280 (1888).

a suit as regularly before them, if prosecuted in the name and for the benefit of the United States, unless presented by properly authorized federal counsel; and, without the consent of the Attorney General, no other counsel can be heard in opposition on behalf of any other departments of the government "

The problem of government counsel, however, is but another manifestation of impatience among government departments when required to resort to one another for services. Yet, aside from periodic departures, practice has tended toward a sound solution. Departments and other types of federal agencies have their own attorneys for the daily tasks of administration, such as the preparation of legal memoranda and the rendition of informal opinions, but their powers are, in the words of one court, "to be read in the light of the general governmental structure of which they form a part." Where important questions of law or differences of opinion arise, they are customarily referred to the Department of Justice. In cooperation, attorneys of other departments or agencies often assist the Attorney General or district attorneys in litigation. In short, the relation of departmental solicitors or counsel to the Department of Justice in matters of litigation has become somewhat akin to the English division of the bar, whereby the solicitors work with the clients (in this case, the executive departments or other agencies) and the barristers (here, the Department of Justice) deal with the courts.<sup>10</sup>

Many considerations require this result. Uniformity of interpretation of the laws, unity in enforcement, the necessity of centralized responsibility for the contacts of the executive with the judicial department, and economy, among others, have forced an organized administration of federal justice. Moreover, attorneys of the Depart-

<sup>9</sup> *The Gray Jacket*, 5 Wall 371 (1866), *Sutherland v International Ins Co of New York* 43 F (2d) 969 (1930), *Cauley v U S*, 240 U S 399, 401-402 (1916), *Confiscation Cases* 7 Wall 454, 457 (1868), *U S ex rel West et al v Dougherty* Fed Cas No 14986 (1870), *U S v McAtoy*, Fed Cas No 15654 (1860), *U S v Morris* Fed Cas No 15816 (1822), and 10 Wheat 246 (1825) but see *Securities and Exchange Commission v Robert Collier & Co*, 76 F (2d) 939 (1935).

<sup>10</sup> Letter Bk I, 61, 18 Op 57 (1884) 20 Op 654 (1893), *Hearings Reorganization of Executive Departments* (1924), 88-90 314, 68 Cong 1 Sess, *Sutherland v International Ins Co of New York* *supra* 971, Circular 1289, to Dist Attys, April 25 1922, D J File 219726, *Hearing Department of Justice Appropriation, 1936*, House Subcomm on Approp, 74 Cong 1 Sess, 1935, 121 *et seq*.

ment of Justice, because of their very detachment from the business of administration, are equipped to interpret the laws and gauge the temper of the courts. There are also many objections often made to a system whereby an administrative agency with the aid of its own attorneys first acts in a semi-judicial capacity in deciding the scope of its authority and then becomes a litigant in the courts to maintain the validity of its own proceedings.<sup>11</sup>

Greater variety of experience, increased resources, more numerous assistants, and the nation-wide network of district attorneys, marshals, and special agents versed in the local practice before the courts and local conditions have been made available to all government agencies through the Department of Justice. These, plus a tradition dating from the foundation of the government itself, could not be duplicated by single departments or agencies of government. Without them no large program of law enforcement could succeed.

In addition to problems of inter-departmental relations, equally important in the development of a law department was authority to supervise the field forces, requested by Randolph in 1791, conferred upon Bates in 1861 in doubtful terms, and made a positive duty of the Attorney General by the Department of Justice Act of 1870. The district attorneys and marshals from the beginning constituted a local unit for the administration of federal justice.<sup>12</sup> Where litigation concerned only private parties, they served as agents of the court to execute and protect its process. Where the matters concerned the United States, they had a more direct part since they then also served the United States as a party litigant. Established by the Judiciary Act of 1789, some of their offices antedated the formal creation of the Department of Justice by fourscore years or more, and in their daily work over the course of nearly a century and a half are countless unwritten or long forgotten dramas of American life.

To this field service the Attorneys General first turned attention in 1870. It soon became apparent that much time and energy would be required in checking irregularities, correcting abuses, and punish-

<sup>11</sup> See Ann. Rep. Atty. Gen. 1912, 57.

<sup>12</sup> See *id.*, 1918, 16, and see Ch. XI, *supra*; but compare Harker, *Supervision of United States Attorneys by the Attorney General in Criminal Cases*, U. Ill. Bull., XI, No. 13, Nov. 24, 1913.

ing frauds, resulting from inefficiency or dishonesty. Exigencies of supervision finally required the Attorneys General to employ "examiners" to investigate accounts, the conduct of cases, and all varieties of complaints. Neglect of United States business as well as absences from offices without leave, as in the case of a district attorney for Alaska who spent his winters in Nebraska, were common, and constantly changing personnel made it exceedingly difficult to locate and discipline carelessness.<sup>13</sup> Yet not all delinquencies were due to the shortcomings of government counsel, who were, and continue to be, fair game for the complaints of parties against whom the United States institutes or defends any form of proceeding. For the very reason that he is honest and able, said Attorney General Olney, "all sorts of accusations and charges against him from lawbreakers are to be expected."<sup>14</sup>

With the growth of population, the United States attorneys found it impossible to care for the many interests of the federal government single-handed. Duties of supervision kept the principal officers of the Department of Justice at the seat of government, and it became the rule not to detail Assistant Attorneys General to assist in the prosecution of cases in the trial courts except under unusual circumstances. Requests for special counsel poured in upon the Attorney General. Harassed by lack of funds, he was forced to take the position that nothing less than some very extraordinary and unusual combination of circumstances would justify the expense of extra counsel for the government. Where funds were not available he was forced to request district attorneys to present the situation to the courts and ask the postponement of cases.<sup>15</sup>

It finally came to be considered better policy for the United States, where the district attorney alone was unable to discharge the duties of his office, to employ permanent assistance rather than engage special associate counsel in individual cases. The need was

<sup>13</sup> Ann Reps Atty Gen 1870 1-2 1893 3 1884 44, 1918, 15 1920 159, 1925 84 1927 59 1928 67 1929, 66 1930 77, Instr Bk S 574, Ex and Cong Letter Bk No 5 16 Misc Letter Bk No 3 413

<sup>14</sup> Instr Bk No 35 418 Misc Letter Bk No 11 85, Misc Letter Bk No 3, 47, Instr Bk Q 9 Instr Bk G 18

<sup>15</sup> Ex and Cong Letter Bk No 54 60 Instr Bk S, 367, Instr Bk N, 511, Ann Reps Atty Gen 1870, 3, 1877, 9, 1897 26-27, 1929, 1

great, and as late as 1929 the federal judges pointed out that the efficiency of the courts in making prompt disposition of the business of the United States was substantially impeded by the lack of sufficient and competent help in the offices of the clerks, marshals, and district attorneys.<sup>16</sup>

However, by far the greatest evil which beset the administration of federal justice in the nineteenth century was the fee system of compensation for local federal law officers. People were harrassed by multitudes of petty and frivolous proceedings instituted for no other purpose than to increase the fees. On the other hand, in some districts the officers were grossly underpaid, either for their very honesty in not bringing frivolous suits or because of the sparse population. In other places the fee system was profitable. "We had a court to-day, in which I got several judgments for the United States, amounting to about two hundred dollars in fees," wrote William Wirt to his wife in 1817, when he was a district attorney. "To-morrow I go on again in the same way,—and by industrious effort hope to return in the steamboat on Friday."<sup>17</sup>

At first, after the creation of the Department of Justice, the Attorneys General merely recommended increases and adjustments. The limit to the amount of fees, which had come to prevail, was deemed neither wise nor just. "One cannot earn ten thousand dollars in fees without doing ten times as much work as the man who receives one thousand dollars in fees," Akerman reminded Congress. "The present system has a natural tendency to diminish the zeal of the officer, when his maximum is reached, and to tempt him to seek improper incidental allowances." Moreover, said his successor, George H. Williams, "fifty dollars is the highest fee now allowed by law in any case to which the United States are a party, and not unfrequently, district attorneys, for this small amount, are required to conduct a suit where the opposing counsel receive five or ten thousand dollars for their services."<sup>18</sup>

<sup>16</sup> Instr. Bk. A-1, 325; Ex. and Cong. Letter Bk. No. 7, 366; Ann. Reps. Atty. Gen. 1929, 6; 1930, 2; 1933, 5; 1934, 6.

<sup>17</sup> Kennedy, *op. cit.*, II, 30-31.

<sup>18</sup> Ann. Reps. Atty. Gen. 1870, 1-2, 8; 1873, 18; 1874, 17; 1875, 6; 1877, 8, 18, 19.

Since the fees prescribed by the statutes were small in a single case, the district attorneys were impelled to rely upon the number of cases and proceedings rather than their importance. Large sums were expended in multitudes of hopeless and petty prosecutions. "The rights and freedom of our citizens are outraged and public expenditures increased," President Cleveland told Congress, "for the purpose of furnishing public officers pretexts for increasing the measure of their compensation." For twenty years the Attorneys General had emphasized this point. The survival of the system, Olney said in 1893, "is nothing less than a wonder and a reproach."<sup>10</sup>

Finally, in 1896 the fee system was abolished. There was an immediate decrease in public expenditures. Moreover, reported Attorney General Harmon, "in the districts where abuses of the fee system have flourished without interruption for a generation fewer persons are called from their daily pursuits; private business suffers less interruptions; the tranquillity of families and communities is less frequently disturbed by groundless prosecutions and the dread of them; the number of persons who, as informers, professional witnesses, etc., seek to gain a livelihood by methods which often cause and always threaten the prostitution of judicial proceedings is largely diminished; and the general morale of the public service has been raised."<sup>11</sup>

Thereafter, the salary scale, both in the field and at the seat of government, required only ordinary adjustment from time to time. The public attorneys could give less time to private practice. They should, thought some, abandon all outside activity and give their whole time to the service of the United States.<sup>12</sup>

Meanwhile the central organization of the Department of Justice at Washington had changed to meet the demands of the twentieth century. More than four hundred separate statutes prescribed its

<sup>10</sup> *Id.*, 1878, 10; 1879, 12; 1880, 12; 1881, 11, 15; 1882, 9, 11; 1883, 12, 22; 1884, 12, 16; 1885, 11; 1886, 11; 1887, 20; 1888, 17, 1889, 18; 1891, 26; 1892, 23; 1893, 23; 1894, 29; 1895, 5; 1896, 4.

<sup>11</sup> *Id.*, 1896, 7, 10.

<sup>12</sup> *Id.*, 1876, 7; 1886, 19; 1887, 22, 1888, 19; 1889, 19; 1890, 22; 1893, 8; 1904, 13; 1910, 28; 1913, 49; 1920, 7; 1924, 1; 1925, 1; 1926, 1.

authority, duties, organization, and officers. Like each of the older departments, it had grown piecemeal.

Speaking very generally, the original office of Attorney General had been designed by law, confirmed by practice and tradition, for the performance of three types of functions. As a member of the cabinet, the Attorney General participated in the policy-forming work of the national executive. He rendered special services at the request of the President, the Congress, or the courts. As the chief non-judicial law officer of the United States, he was responsible for the nation's legal business in the Supreme Court, the giving of legal advice to the President and to the cabinet, the maintenance of the tribunals of justice, and the preservation of the public peace.

The succession in office was rapid. Some Attorneys General served long and gave great talents to the organization and administration of justice; others served briefly, their terms cut short by careers at the bar, on the bench, or in other departments of state. As lawyers, technical and professional men, many found the spotlight of public life irksome. "I shall," said Evarts, "return to my business of farming and lawing and leave to the newspaper correspondents the conduct of affairs." <sup>11</sup>

After the creation of the Department of Justice, the character of the work of the Attorney General changed. Where theretofore he had been a counselor to the cabinet and a barrister in the Supreme Court, after 1870 he became immersed in the details of departmental administration and litigation on a national scale. <sup>12</sup> As the country and the business of government grew, the Attorney General's department developed an organization and personnel necessary to cope with concerns, as forecast by Attorney General Cushing, "co-extensive with the habitable globe" and the "wonderfully enlarged and complicated interests of society." <sup>13</sup>

The Department of Justice Act of 1870 had provided two Assist-

<sup>11</sup> Cushing, *op. cit.*, 353-355. *Justice and the press*: Dyer, *The Public Career of William M. Evarts* (1933), 112; *Diary of Edward Bates* (Beale ed. 1933), 298; Bishop, *Charles Joseph Bonaparte* (1922), 152-154; *Diary of Gideon Welles* (1911), II, 78-83.

<sup>12</sup> Olney to a prospective Attorney General, James, *Richard Olney* (1923), 27 n.

<sup>13</sup> Cushing, *op. cit.*, 347.



ant Attorneys General and a Solicitor General. Thereafter, additional Assistant Attorneys General were added to care for new fields of government legal business, as well as an "Assistant to" the Attorney General and an Assistant Solicitor General. These officers and the district attorneys are appointed by the President with the advice and consent of the Senate. As subordinate or special aides, "special assistants" and "special attorneys" are appointed and commissioned by the Attorney General under the authority of the original statute creating the Department of Justice and various other acts of Congress."

During the first twenty years after the creation of the department, however, the simple and informal organization at Washington remained largely unchanged. With the turn of the century, many new judicial districts were created. There was a general increase in the business transacted by the federal courts, particularly throughout the West, Middle West, and the territories. By 1910 the work of the department had rounded out much in the general form existing today, to which—aside from extraordinary functions, such as those required during the World War and in the enforcement of the Prohibition Act—has since been added the whole tax litigation of the government."

The present Department of Justice—charged with the rendition of every character of legal service, touching every field of human endeavor and the needs and problems of a far-flung nation—must necessarily devise its work in such fashion that justice may be done promptly as well as properly. Its typical functions fall naturally into the several principal subjects of public law. Accordingly, the six Assistant Attorneys General head "divisions" primarily concerned with the enforcement of statutes on trade and commerce," internal

<sup>16</sup> 16 Stat. 162, June 22, 1870; 32 Stat. 1031, 1062, Mar. 3, 1903; 48 Stat. 283, 307, Sec. 16, June 16, 1933; revision of titles recommended, Ann. Rep. Atty. Gen. 1907, 9.

<sup>17</sup> *Id.*, 1887, 24; 1888, 20; 1889, 17-18; 1892, 3; 1894, 3; 1895, 3; 1901, 37; 1905, 4; 1910, 1; 1934, 15.

<sup>18</sup> Formerly in the charge of The Assistant to the Attorney General, which office was created by Act of Mar. 3, 1903 (32 Stat. 1031, 1062) and its incumbent immediately assigned to antitrust enforcement. *Cong. Directory*, 1904, 58 Cong. 3 Sess., 270. Since 1933 it has been supervised by an Assistant Attorney General. Ann. Rep. Atty. Gen. 1933, 16.

revenue," claims by and against the United States," public lands," crimes," and customs " There are bureaus for investigations, prisons, and the defense of war risk insurance cases There is also a pardon attorney "

In addition, the Solicitor General, next in command to the Attorney General, has come to have charge of all government interests in the Supreme Court and also authorizes or rejects the taking of appeals to the intermediate courts The high responsibility of this officer appears in the light of the fact that between thirty and forty per cent or more of all litigation in the Supreme Court concerns the United States " The Assistant Solicitor General, whose office was created in 1934, has charge of preparation of opinions given by the Attorney General to the President and cabinet " He also has charge of the consideration of form and legality of proposed executive orders and proclamations, which are submitted to the Attorney General before approval by the President Proposed compromises in all types of government litigation are also reviewed in his office

The Assistant to the Attorney General, third in rank in the Department of Justice, has recently come to have charge of all matters of administration, personnel, and legislation affecting the department—with respect to both the field forces and those at the seat of government Only in recent years has the personnel function, which

" Created in its present form in 1934 Ann Rep Atty Gen 1934 15 There had been in Internal Revenue Tax, Prohibition and Miscellaneous Matters Division since 1919 Ann Rep Atty Gen 1919 81-87 In 1924 it became the Division of Prohibition and Taxation, to which in 1925 was added supervision of the federal prisons *Id* 1924 79-84, 1925 38-59 The prisons are, of course now in a separate bureau See Ch XVII

" 16 Stat 162 Sec 14, June 22 1870 22 Stat 485, Sec 5 Mar 3 1883 36 Stat 1142, Sec 185, Mar 3, 1911 This division largely succeeded to the work of the former Division of Admiralty Alien Property Matters Foreign Relations, Matters of Finance Territorial and Insular Affairs, War Risk Insurance and Minor Regulations of Commerce (Ann Rep Atty Gen 1932 96) which became the Civil Division in 1932 (Ann Rep Atty Gen 1933 83 89) and which, in turn was abolished in 1934 In addition to claims against the United States, admiralty and patent matters are also handled by this division as well as the defense of certain suits against customs collectors Ann Repts Atty Gen 1919 81, 1925 38, 1934 15, 76, 1935, 70-83

" *Id* 1910 26-27 n 57 *infra*

" *Id* 1919 75 81 1922 90-92 Ch XXII *supra*

" 36 Stat 11 108 Sec 28 Aug 5 1909 Ann Rep Atty Gen 1921 113

" See Cummings D J Order 2507 Dec 30 1933

" See Ann Repts Atty Gen 1930 12 1931 17-20 1935 8-16

" Miller to Cooley, May 22 1889, Letter Bk U, 154, Ann Rep Atty Gen 1934, 119-123

includes investigation of candidates for judicial office and of officers and employees of the department, including district attorneys and marshals, been organized formally under the supervision of a separate officer of the Department of Justice."

Expenditures until the close of the last century were normally approved personally by the Attorneys General whose scant funds made it necessary to parcel out money carefully. The employment of court stenographers was a particularly troublesome matter. There had been a chief clerk since Crittenden appointed Judge Bibb in 1850. This official in recent years became the Administrative Assistant to the Attorney General, in charge of such matters as the clerical force, accounting and fiscal matters, supplies, records, library, and the like."

The titles of these several officers are the cumulation of a century and a half. Fragmentary acts of Congress, custom, and necessity have molded the organization. The shifting duties of the Assistant to the Attorney General indicate the changing course of development. The title was selected and the office created at the suggestion of Attorney General Knox in 1903. Attorney General Bonaparte in 1907 recommended that it be changed to Chief Counsel as more indicative of the position and duties, while Attorney General McReynolds proposed that it revert to Assistant Attorney General, and until recently The Assistant to the Attorney General headed the work of the Antitrust Division of the department."

A glance at the records reveals two general bases of departmental organization—one according to subject matter, such as taxation, customs, lands; another according to the stages or functions in the process of law enforcement, such as investigations and trials, appeals, opinions, and administration. Neither basis of organization has wholly prevailed. The trial work has been grouped roughly into "divisions" charged with the work in particular fields, each under the supervision of an Assistant Attorney General reporting directly to the Attorney General. However, appeals, opinions, and administra-

<sup>16</sup> *Id.*, 1919, 6, 8; 1923, 84; 1928, 67; 1929, 66; 1934, 15; 1935, 17.

<sup>17</sup> *Id.*, 1907, 9; 1919, 6; 1920, 158-167; 1921, 122-128; 1923, 68; 1934, 15; 1935, 17.

<sup>18</sup> *Id.*, 1907, 9; 1913, 6; 1933, 16; Dodge, *Origin and Development of the Office of Attorney General* (1929), House Doc. 510, 70 Cong. 2 Sess.

tion for the whole department are supervised by separate officers who function between the Attorney General and the Assistant Attorneys General. There is no single officer, however, to correlate and relieve the Attorney General of the supervision of countless matters of investigation and trial work of the department, though Attorney General Bonaparte once proposed that there be a "Chief Counsel" in the department."

With a change of administration, and more particularly a change of the political party in power, the Attorney General and his principal assistants change. The President's wishes are generally respected in the appointment of the Attorney General. In the field, the rule of senatorial courtesy gives individual Senators great powers in the selection of district attorneys and marshals, an effective veto which imports local politics into the administration of federal justice."

Yet there has been an effort to avoid partisan administration. "The office I hold," said Attorney General Bates, "is not properly *political*, but strictly *legal*; and it is my duty, above all other ministers of State, to uphold the Law, and to resist all encroachments, from whatever quarter, of mere will and power." President Cleveland in 1886 issued an order prohibiting political activity to all in the federal service, and Attorney General Garland directed federal law officers to comply with its requirements. "Office holders are the agents of the people—not their masters," said the President. "Not only is their time and labor due to the government but they should scrupulously avoid in their political action as well as in the discharge of their official duty, offending by a display of obtrusive partisanship." The Attorneys General and the Presidents have continued, to a greater or lesser extent, to enforce the rule that, by the force of his

<sup>88</sup> With the growing demands of the federal legal system the Attorneys General will undoubtedly find it necessary to free themselves of *direct* supervision over trials and investigations. In addition to the Solicitor General for the Supreme Court and appellate matters generally, the Assistant Solicitor General to prepare opinions for the Attorney General, and an Assistant Attorney General to have charge of personnel and administration, there might also be a Counsel General as chief counsel to supervise all the trial and investigative work of law enforcement. The "divisions" charged with particular fields of public law might be placed under permanent non-political Assistants to the Attorney General. Four major officers might thus replace the present nine.

<sup>89</sup> Kennedy, *op. cit.*, II, 221-222, see, for example, the stalemate over the appointment of a district attorney for Wisconsin, letters exchanged between La Follette and Wickersham, Jan. 17 and 19, Feb. 11 and 14, and May 30, 1911, *Pers. Files, Wis.*; National Commission on Law Observance and Enforcement, *Report on Prosecution*, 9.

position, an officer of the Department of Justice is disabled from conspicuously engaging in political contests. In 1926 Attorney General Sargent issued a further circular on the subject, which has been reissued from time to time.<sup>41</sup>

The terms of officers of the department and their assistants, too, have been respected to an extent through political changes. "Of all the officers of the Government, those of the Department of Justice should be kept most free from any suspicion of improper action on partisan or factional grounds," Theodore Roosevelt wrote to Attorney General Moody on this subject in 1904, "so that there shall be gradually a growth, even though a slow growth, in the knowledge that the Federal courts and the representatives of the Federal Department of Justice insist on meting out even handed justice to all."<sup>42</sup>

So organized, the attorneys of the Department of Justice must appear in the courts as counsel for the United States. To many people today, this function is typified in the defense of legislation before the Supreme Court. Only in recent years have constitutional questions come to comprise a large part of the Supreme Court's work.<sup>43</sup> Nevertheless, the exercise of ordinary federal powers and the protection of national rights—foreign affairs, lands, coinage, revenue—were constantly before the Court in the earlier days, where the Attorneys General or special counsel designated by them appeared for the United States.

When in 1792 *Chisholm v Georgia* was set "for debate"—as Randolph, who appeared as private counsel for Chisholm, put it in a letter to Madison—he deduced "that the premier [Chief Justice Jay] aimed at a cultivation of Southern popularity, that the professor

<sup>41</sup> *Bates Diary op cit* 350 Instr Bk C, 64 Instr Bk No 41, 6, Instr Bk No 5, 251, Instr Bk No 127 79 Natl Commission on Law Observance and Enforcement *op cit* 37 Circular 1886, Circular Bk No 2, 183, Sargent Circular 1748, Sept 1 1926 reissued from time to time during the next ten years.

John Gimbaldis Sargent (1860- ) was born at Ludlow, Vermont served as state's attorney secretary of civil and military affairs and attorney general of Vermont and was appointed Attorney General of the United States (1925-1929) by President Coolidge Nat Cyc of Am Biog, Current Volume A 12.

<sup>42</sup> Roosevelt to Moody Aug 9 1904 Pers Files, Dept of Justice, James *op cit* 26 Ann Repts Atty Gen 1896, App 60, 1897, 13, 1911, 1-2, 1912, 7-8, 1922, 91.

<sup>43</sup> See Reed *The Constitution and the Problems of Today*, Address to the Virginia Bar Assn by the Solicitor General, Aug 7, 1936.

[Justice Wilson] knows not an iota of equity; that the North Carolinian [Justice Iredell] repented of the first ebullitions of a warm temper; and that it will take a series of years to settle with such a mixture of judges a regular course of chancery." " Thus freely the great statesmen of that day discussed the administration of justice.

A quarter of a century later, before this "holy sanctuary," as Pinkney called it, "a more than Amphictyonic council," Wirt and Pinkney were associated as private counsel in *McCulloch v. Maryland* involving the constitutionality of the Bank of the United States. Later Wirt and Webster appeared together in *Gibbons v. Ogden*, known as the *Steamboat* case. "Webster is as ambitious as Caesar," wrote Wirt. "He will not be outdone by any man." "

The day of these forensic titans soon passed. New questions, new judges, and coldly reasoned arguments altered the atmosphere of the Court. Cushing approvingly heard Taney read his *Dred Scott* decision, which, though not a government case, enunciated Cushing's own views." Bates, Lincoln's Attorney General, enjoyed pleasant personal relations with the justices, including Chief Justice Taney. "The lustre of his fame is for the present dimmed by the bitterness of party feeling arising out of his unfortunate judgment in the *Dred Scott* case," wrote Bates. "That was a great error; but it ought not and will not, for long, tarnish his otherwise well earned fame." Justice Swayne told him what the Court thought of the arguments of special counsel and even suggested steps which the executive should take to meet forthcoming decisions. Later Bates became "shamed and disgusted at witnessing the proceedings in this highest of all courts." Irked by some ruling on the law of pleading, he exclaimed to his diary, "The scales of justice rise and sink by some motive power, unknown to me, which, if not interested, seems to me a capricious will." "

For the most part, however, duties in the Supreme Court were technical and absorbing. From 1789 to 1870 the Supreme Court wrote some 3500 opinions, about a fourth of which involved the

" Conway, *op. cit.*, 168, see also 145.

" Kennedy, *op. cit.*, I, 340, 354-360; II, 80-81, 142-144.

" Fuess, *op. cit.*, II, 153-155.

" Bates Diary, *op. cit.*, 177, 204-205, 281-282, 356-357, 418.

United States. Of the nearly 900 opinions in government cases, more than half concerned the construction of statutes and only 100 the validity or scope of executive action; and the government had been successful in more than 500. They dealt almost entirely with crimes, taxes, navigation and shipping, claims by and against the United States, public and Indian lands, and procedure; slightly more than half had been instituted by the United States, and the remainder had been brought against the United States by private parties.<sup>48</sup>

In 1870 the Attorneys General began making annual reports to Congress, pursuant to the new Department of Justice Act. Eight years passed, however, before they described the important government cases in the Supreme Court. In 1885 they began reporting the "Business of the Supreme Court," but it was not until 1898 that full discussions of each government case were presented to Congress. Cases on civil rights, the Thirteenth and Fourteenth Amendments, lotteries, Chinese exclusion laws, agricultural and manufacturing bounties, railroad regulation, labor, and the trusts were stressed before the close of the century.<sup>49</sup>

The Attorneys General frequently argued these cases themselves. Olney argued the *Debs* case, gave a dinner for all counsel and their ladies, and sent Debs an "autographed" brief; and Debs expressed admiration for the man who had sent him to prison. The twentieth century soon brought such a volume of business that the Attorneys General seldom appeared in person in the Supreme Court, and then only in cases of gravest importance—such as the *Gold Clause* cases.<sup>50</sup> Law enforcement was entering a stage when the problems were to be met to a great extent in the trial courts of the land.

<sup>48</sup> This covers a period of eighty years. In the sixty-five years which followed, through the October term 1935, the Court wrote 14,275 opinions. The United States was involved in 3,793 of these, concerning for the most part claims, crimes, taxes, navigation, patents, mails, money and banking, bankruptcy, naturalization and immigration, railroads, antitrust, prohibition, and world war matters. Two-thirds of the opinions in government cases favored the United States.

<sup>49</sup> Ann. Reps. Atty. Gen. 1870, 6; 1878, 1-6; 1879, 1-8; 1880, 5; 1885, 5-6; 1891, 3-5; 1892, 21-22; 1893, 3-5; 1894, 3-6; 1895, 13; 1896, 16; 1898, 4-6; 1904, 45; Speed, *James Speed* (1914), 77.

<sup>50</sup> *Debs* case, James, *op. cit.*, 58-59; *Gold Clause* cases, *Norman v. B. & O. R. Co.*, 294 U. S. 240 (1935) and cases cited in n. 56 *infra*. In addition to the Attorney General, Stanley Reed, counsel for the Reconstruction Finance Corporation, and Assistant Solicitor General Angus McLean appeared for the United States in the *Gold Clause* cases.

Most cases, of course, never reach the Supreme Court. They are finally determined in the district courts, the circuit courts of appeal, and in the customs courts. They must be tried or defended without the spotlight, and yet to all but a few they represent the administration of justice. Great cases in the Supreme Court today are often the climax of nation-wide litigation. Two thousand injunction suits were controlled by the Agricultural Adjustment Act decision in *Butler v. Hoosac Mills*, and the Supreme Court ruling was followed by three hundred additional tax refund cases. A thousand judicial proceedings had been instituted and many of them terminated under the National Industrial Recovery Act before the *Schechter* decision.<sup>81</sup> Moreover, in the trial courts the facts are developed and records made upon which the Supreme Court and other appellate courts must rule.

The services of public counsel in the trial courts of the nation range over the whole field of the law, though the particular interests of the United States are concentrated in such general subjects as revenue, money claims by and against the United States, lands, crimes, and the regulation of interstate and foreign commerce. The successive chapters of federal legal history may seem to indicate that problems arise and are settled, only to be succeeded by new problems. On the contrary, however, most of these problems are cumulative; new problems and new subjects arise, but the old remain.

The federal criminal law, the antitrust laws, and some aspects of other subjects have been described sufficiently. Other fields, some of them of the greatest public importance, have grown unobtrusively and today represent the principal concerns of the United States in rudimentary and essential spheres of government. Into the Claims Division of the Department of Justice, for example, come the countless money suits against the United States, to which a liberal government has submitted itself in a long series of statutes. These cases arise out of contracts for building battleships, erection of public buildings, dredging and improvement of rivers and harbors, building and maintenance of dams, locks, drydocks, and sea walls, for army sup-

<sup>81</sup> *U. S. v. Butler*, 297 U. S. 1 (1936); *Schechter Corp. v. U. S.*, 295 U. S. 495 (1935).



plies and carrying the mails, as well as suits for the alleged use and infringement of patented devices and for materials or services."

To these Congress has added special classes of claims, such as those arising out of Indian affairs." Another persistent class of special claims arises out of war. As late as the close of the nineteenth century, there were pending cases involving claims of citizens for losses at the hands of the French in the Napoleonic Wars, Mexican claims, and Civil War claims, as well as Spanish Treaty claims." By 1920 World War claims had materialized into an outstanding feature and did not reach their peak until 1926. These cases against the government arose from the sudden cancellation of war contracts and from requisitions of supplies, equipment, arms, buildings, ships and ship materials, food, feed, fuel, and patents. On the other hand, the government had claims against defaulting contractors and actions for injuries to public property, fraud, the recovery of advances made by the War Credits Board, money paid by mistake, and for the value of property sold by the government."

Claims cases grow more extensive as the scope of public activity increases. They involve historical controversies and every conceivable issue of law between the people and their government, including matters of the gravest constitutional import; " and in the management of this vast field of public law business, the Attorneys General have found it necessary to recommend much legislation.

The field of land problems and land litigation had become one of the most constant and laborious duties of the small staff of federal law officers by the middle of the last century. It was not until 1910, however, that a public lands division was organized to attend the enormous and steadily increasing volume of this business. At that

" Ann. Rep. Atty. Gen. 1916, 86-87; see also *id.*, 1893, 8; 1895, 15; 1910, 64; 1912, 60; 1913, 31; 1926, 69; 1935, 82.

" *Id.*, 1893, 6; 1895, 16; 1896, 20; 1898, 12; 1932, 85.

" *Id.*, 1928, 44-45. *Napoleonic Wars: Id.*, 1887, 23; 1890, 5; 1894, 8. *Mexican claims: Id.*, 1893, 22; 1894, 23; 1895, 21; 1896, 25. *Civil War: Id.*, 1894, 8. *Alabama claims: Id.*, 1883, 18; 1884, 15; 1885, 43. *Spanish Treaty claims: Id.*, 1901, 34-35.

" *Id.*, 1919, 69-70; 1920, 56, 61; 1923, 55; 1926, 73; 1927, 39.

" *Historical and constitutional controversies: Id.*, 1916, 87; 1870, 5; 1878, 7-8; 1891, 7-8; 1892, 3, 8; 1894, 7; 1895, 14-15; 1920, 103-104; *Nortz v. U. S.*, 294 U. S. 317 (1935); *Perry v. U. S.*, 294 U. S. 330 (1935); and see 48 Stat. 112, June 3, 1933.

time, there were pending in the courts 1500 public lands cases and almost again as many with respect to Indian lands, involving millions both in money and in acres."<sup>77</sup>

Aside from continuous and heavy legal duties in connection with the conservation and disposition of the public domain and of the Indian lands, the law officers must participate in the sale of lands as well as purchases for public buildings, fortifications, harbor development, reclamation, navigation and water power projects, bird, game, and forest preserves. When real estate is acquired by purchase, Congress has required the opinion of the Attorney General as to the validity of title before public funds may be expended. Where, however, the government and private owners cannot agree on terms of purchase or where there is question of the validity of title or of the legal capacity of the owner, the government must resort to the courts, there to be faced with procedural problems and delays inherent in the ancient law of eminent domain and the requirements of state statutes."<sup>78</sup>

Customs duties, beginning with the second statute of the First Congress, have given rise to great numbers of civil and criminal cases throughout the history of the United States. Smuggling has sometimes developed into major scandals—such as the sugar importation frauds which created a stir in 1907, involved systematic and large-scale corruption of public officials, and indicated that the government had lost millions in revenues. In 1910, smuggling by returning American tourists, as Attorney General Wickersham reported, became "conspicuous."<sup>79</sup>

By far the more important phase of customs work, however, is the defense of the action of officers of the customs under the tariff statutes and regulations, at the suit of private importers who maintain either that their goods are erroneously classified for assessment or that the appraisal of value is excessive. In 1909, civil customs litigation was centralized under an Assistant Attorney General, and

<sup>77</sup> Cushing, 8 Op. 405 (1857) and 6 Op. 326, 337-338 (1854); Letter Bk. A-3, 132 (1858); Ann. Reps. Atty. Gen. 1910, 26; 1911, 28; 1912, 38; 1933, 84.

<sup>78</sup> *Id.*, 1890, 16; 1910, 82; 1911, 34; 1912, 53, 62; 1913, 37; 1930, 3; 1933, 1.

<sup>79</sup> *Id.*, 1890, 19; 1910, 11-21, 22; 1912, 36, 63.

into this Customs Division of the Department of Justice now come cases involving many millions of dollars annually. On July 1, 1935, there were 187,337 cases pending in the customs courts. Not only the customs statutes but also the Constitution, treaties, and trade agreements are frequently at issue.<sup>80</sup>

Until the present century, almost all federal revenues were derived from the customs. With the adoption of the Sixteenth Amendment to the Constitution and income tax legislation, there was suddenly created a major field of litigation in the assessment and collection of "internal" revenue. This work had not reached its stride until the United States emerged from the World War, and it was largely performed by the Treasury. In 1919, however, tax litigation was grouped with miscellaneous matters in the Department of Justice, in 1925 it was allied with prohibition enforcement, and upon the repeal of prohibition the Tax Division of the Department of Justice was created to conduct these cases in close cooperation with the Treasury.<sup>81</sup>

In addition to the income tax, however, there are estate, gift and manufacturer's excise taxes, as well as special taxes upon particular commodity transactions. There are also war taxes on excess profits and munition manufactures. Contests of the validity of assessments and claims for the refund of taxes paid, as well as criminal proceedings for tax avoidance and civil proceedings for tax collection, comprise the principal classes of cases. In 1935, for example, more than 2700 new cases were filed in the courts and 3000 were closed. Aside from compromises, criminal cases, and those determined in part for the government and in part for private suitors, the successful termination of 740 cases secured to the Treasury more than forty-seven million dollars in that year.<sup>82</sup>

Into the Criminal Division of the Department of Justice come thousands of cases for the protection of federal services and functions, the mails, money, commerce, banks and bankruptcy, and the like, as well as those more popularly publicized cases of kidnaping,

<sup>80</sup> *Supra*, n. 32; Ann. Reps. Atty. Gen. 1891, 8; 1921, 112-118; 1930, 32-35; 1935, 110, 112, 127-128.

<sup>81</sup> *Supra*, n. 29.

<sup>82</sup> *Id.*, 1935, 51-52, 54.

extortion, and stolen property. This work is handled largely through the local district attorneys "

Each year the Antitrust Division receives and investigates hundreds of complaints of monopoly and restraint of trade, out of which grow civil and criminal proceedings Here, also, the orders and processes of the various federal administrative tribunals—the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, and others—are defended or enforced Labor cases and agricultural regulations are also referred to this division "

These very general classes of litigation are supplemented by volumes of cases arising out of international affairs and war, immigration and naturalization, patents and copyrights, shipping and navigation, and a host of other matters However, the mere enumeration and classification of public lawsuits explains little of the actual services and duties of public counsel Here is a field of government, little known and less understood Obviously, the importance of an attorney's skill and diligence is at least as vital to the government as to private litigants The omission of proof, the neglect of precedent, or errors of procedure may deprive the government of property or money in values and sums which far exceed the stake in private litigation Indeed, in the defense of so impersonal a client as the United States, counsel must be possessed not only of a high sense of public service but also of efficiency, diligence, and tirelessness which will enable them to work at the drudgery of the law often under conditions of obscurity and want "

By far the most discriminating duty with which public counsel is charged is the preliminary determination of facts upon which civil or criminal cases may be instituted If cases are not instituted, wrongs may go unredressed If prosecution is improvidently begun, the time, money, and reputation of innocent parties are sacrificed In many fields, decision to institute cases requires also a judgment whether

" *Id.* 1909, 29, 1912 49 61 1913 45 1916, 55 58 1917, 76-78, 1918, 99-101, 1926 3, see Ch XXII *supra*

" See Ch XVI, and recent annual reports of the Attorney General

" See Griggs to Cockrell, Feb 14, 1900, Ex and Cong Letter Bk No 44 244

proceedings should be civil or criminal, the nature and number of counts, offenses, claims or contentions that should be pressed, and whether federal action should precede, follow, or supplement state proceedings on the same subject. Herein only understanding and sound judgment can point the way."<sup>66</sup>

Demands of every character pour in upon public counsel, after as well as before proceedings are instituted, to secure either withholding, modification, or dismissal of actions pending in the courts. Extenuating circumstances, public sentiment, powerful intervention, the public career of the prosecutor, and past service of the accused—all are injected into the cases. Occasionally, of course, proceedings are misconceived. "If cases are found to be instituted in which you have been in error, or been deceived, drop them as soon as you ascertain that fact," directed Attorney General Devens. "I wish to give no color to the insinuation that the United States process is ever used for injustice or oppression."<sup>67</sup>

The duties of public counsel do not cease with the institution and trial of cases. In some respects the problems of appeal are even more troublesome, for though the mass of evidence has been reduced to cold print, explanations, new "facts," and interpretations of the language of witnesses fly thick and fast. The Attorney General is urged to take appeals or not to take them. Those who have defeated the government in the trial courts complain bitterly when the government appeals to test its rights. Where, on the other hand, public counsel perceive errors in trial victories, it is their duty to concede them in the appellate courts."<sup>68</sup>

Also, after the institution of proceedings, parties often request the government to compromise or settle cases on mutually acceptable terms in order, in theory, to avoid the expense and uncertainties of litigation. "I know of no reason why the Government, more than a private person, should waste money in litigation when its uselessness

<sup>66</sup> See Instr. Bk. K, 308; Instr. Bk. B-1, 153; Instr. Bk. C, 696; Instr. Bk. H, 355; Natl. Commission on Law Observance and Enforcement, *op. cit.*, 18, 20, 11.

<sup>67</sup> See Ex. and Cong. Letter Bk. V, 485; *id.*, E, 390; Instr. Bk. No. 49, 90; Instr. Bk. N, 111; Letter Bk. K, 40; Instr. Bk. B-1, 198, 432; Misc. Letter Bk. No. 50, 30; Instr. Bk. P, 124; Misc. Letter Bk. No. 1, 497; Instr. Bk. No. 43, 557; Instr. Bk. H, 355.

<sup>68</sup> Letter Bk. A-3, 7; Instr. Bk. No. 61, 174; *Cook v. U. S.*, 138 U. S. 157, 185 (1891).

has become apparent," Attorney General Harmon reported to Congress in 1896. Indeed, from the earliest days the Congress has not only authorized but in some cases directed settlements and compromises. At the same time, however, no more finely discriminating legal judgment is entrusted to public counsel. Searching investigation and analysis of the law and the facts are required, and the merits of the opposing claims must be balanced against the general uncertainties of litigation and the adequacy of the proffered settlement.\*\*

In the field of criminal prosecutions, except where Congress has provided otherwise in tax prosecutions, quite another rule prevails. "Enter into no compromise with offenders against the United States," directed Attorney General Devens in 1880. "I want no trafficking or guarantees, but a judicial investigation." Sometimes, however, the courts themselves, with or without the recommendation of counsel, grant a type of compromise by imposing slight sentences in return for pleas of guilty or for giving evidence against accomplices.†

In these and the countless further, never-ending variety of questions which occur in legal procedure public counsel wield an authority which affects the daily lives, liberties, and property of the people of the nation. Except in unusual cases where the facts and law seem clear, legal proceedings are so complex that upon public counsel alone rests a wide discretion. Congress cannot, in the very nature of the subject, prescribe the detailed conduct of public litigation generally, and statutes rarely contain directions for the conduct of particular law suits.††

In a large part of this work the officers of the Department of Justice are required to serve as counsel for other departments or agencies of government, a relationship not always happy. Adminis-

\*\* Ann. Rep. Atty. Gen. 1896, 23-24; and see 2 Stat. 229, Sec. 9, Mar. 3, 1803; 12 Stat. 737, Sec. 10, Mar. 3, 1863; Ex. Order 6166, Sec. 5, June 10, 1933 (theretofore the power to compromise was rarely exercised by the Attorney General but left instead to the Secretary of the Treasury, the General Accounting Office, and other agencies).

† Devens to Dist. Atty., La., Oct. 27, 1880, Instr. Bk. K, 272; to Dist. Atty., S. C., Oct. 20, 1878, Instr. Bk. H, 337; to Dist. Atty., Tex., Mar. 3, 1881, Instr. Bk. K, 457.

†† See 35 Stat. 781, 807, Mar. 3, 1909 (direction to advance case); 42 Stat. 1448, Sec. 6, Mar. 4, 1923 (direction to terminate receivership); and see Ann. Rep. Atty. Gen. 1891, 17-19.

trators, bent upon specialized tasks, make unruly clients. Even lawyer-administrators, seeking to perform the double function of executive and barrister-at-law, are apt to insist that refined technology should outweigh the judgment of counsel familiar with the general processes and practice of the courts. Too often, with constant friction and frequent disaster, they give point to the old proverb—"He who is his own lawyer has a fool for his client."

The Attorney General and the officers of the Department of Justice are charged with no such simple duty as requires merely interpretation, prosecution, or defense at the behest of public administrators. In the words of the Supreme Court, they have the *duty*—not merely the power—of examining the "scope and propriety" of administrative action and of "sifting out" that which is pertinent and lawful before asking the courts to adjudge. Moreover, says the nation's highest tribunal, the wide scope and variety of these questions "show the wisdom of requiring the chief law officer of the Government to exercise a sound discretion." <sup>11</sup>

Here indeed the Department of Justice, standing between the executive officers of government and the courts, is given the added function of a "buffer" in the relations of the executive to the judiciary. The law officers, observed on the one hand by the judges and urged on the other by public officers or legislators, face obstacles of the greatest difficulty. In these circumstances they make poor partisans, a failing which has called upon them criticism since the earliest days.

Moreover, the enforcement of laws is always delicate as well as difficult. Particularly in the field of federal legislation, laws do not find places upon the statute books until the social conditions which they are designed to remedy have become fixed. Even where the justice of legislation is apparent, large groups whose daily lives are entwined with existing conditions constitute an influential opposition. Small groups and large seek to shape law enforcement to their own ends—in effect, to secure an unwarranted dispensation in the administration of justice.

<sup>11</sup> *Federal Trade Commission v. Claire Co.*, 274 U. S. 160, 174 (1927); see Cushing, *op. cit.*, 335.

In nearly all cases, both civil and criminal, counsel for the government are commonly accused of "persecution" by those against whom proceedings are brought. "Every person who violates the law attempts to explain his conduct," philosophized Attorney General Garland in 1885, "and if such explanations are to be held acceptable, punishment would hardly ever follow." <sup>73</sup>

Enforcement of the laws, furthermore, is met with the currents and eddies of popular passion—intolerance, partisanship, sectionalism, economic conflict.<sup>74</sup> Where laws are passed at the instance of a small group or where public sentiment changes, executive officers of the law are placed in the uncomfortable predicament of choosing between the law which they are sworn to execute and the democracy which they serve.

The confidential writings of the Attorneys General show how heavily the problem of public sentiment has weighed upon them. "Public opinion is never spontaneous with the people—it is always a manufactured article," noted Bates in the early days of the Civil War. "Public sentiment is as unstable as the current of the Mississippi," wrote Speed to his brother in 1866. "It is no easy task," Cushing had said in this connection years before, "to abolish ignorance, poverty, vice, and crime." <sup>75</sup>

The administration and enforcement of the laws, however, begin not in the courts but in the offices and agencies of government to which necessarily there has been committed the authority to enforce many statutes. This, indeed, is the gist of the executive function. Yet, before enforcement may begin, and before each new problem can be solved, public officers must determine the meaning and scope of the laws.<sup>76</sup> Here, public administrators must have the counsel of those skilled in legal interpretation and legal institutions. There is no more important stage of administration. A misstep means the embarrassment of citizens, improvident use of public funds, and in some fields the hostility of the courts. Accordingly, the Judiciary Act of

<sup>73</sup> Garland to Dist. Atty., Mass., Nov. 11, 1885, Instr. Bk. T, 7.

<sup>74</sup> See Instr. Bk. B-1, 595; Letter Bk. U, 539; Instr. Bk. No. 51, 389; Instr. Bk. R, 276.

<sup>75</sup> Bates: *Diary*, *op. cit.*, 271; Speed, *op. cit.*, 90; Fuess, *op. cit.*, II, 203.

<sup>76</sup> See Cushing, *op. cit.*, 346.



1789 imposed upon the Attorney General the duty of giving opinions on questions of law referred to him by the President and heads of departments, and the Department of Justice Act of 1870 amplified the function by permitting the Attorney General to delegate to the officers of the department the writing of opinions except where constitutional questions are raised."

When, however, Thomas Jefferson wrote James Madison that "the government is now solely directed by Randolph," \*\* he was not referring to Randolph's legal opinions as Attorney General. The President must, like private individuals or other officers of government, have the advice of counsel on questions of law, but he also requires advice on matters of policy and discretion. His official advisers are the cabinet, and in their councils the Attorney General, because of the nature of American institutions, may assume a position of great importance.

Indeed, the Constitution recognizes that the President may require the written opinion of the head of any of the executive departments; and it has been the practice, since the time of Washington, for the President to advise with the Attorney General and the Secretaries upon critical subjects of executive deliberation." So President Lincoln requested Attorney General Bates' opinion whether it was "wise" to provision Fort Sumter. "This is not a question of lawful right," said the Attorney General, "but of prudence and patriotism only." It was both a military and a political matter as were so many of the questions submitted by President Lincoln to his cabinet. "As a counsellor of the President," noted Bates, "I do not presumptuously set myself up as a commander." \*\*

Furthermore, as the servant of all the people the President must of necessity seek information outside the cabinet. There are many sides to this practice. "He is under constant pressure of extreme factions and of bold and importunate men," said Lincoln's Attorney General, "who taking advantage of his *amiable weakness*, commit

\*\* 1 Stat. 73, 93, Sept. 24, 1789; 16 Stat. 162, Sec. 14, June 22, 1870, and see also Secs. 4, 6, 18.

\*\* Conway, *op. cit.*, 140.

\*\* Art. II, Sec. 2; Cushing, *op. cit.*, 330; Bates to Stanbery *re* West Virginia "cabinet opinions," Aug. 3, 1867, A. G. Ms.; Welles Diary, *op. cit.*, I, 205, and II, 23-25; Griggs, 23 Op. 360, 364 (1901).

\*\* Bates Diary, *op. cit.*, 178-180, 186.

him beforehand to their ends, so as to bar all future deliberation." <sup>81</sup> Others have been even less charitable toward their Presidents.

Curious in another way was President Taft's order setting up a presidential court to determine the much mooted question under the pure food laws, "What is whiskey?" Solicitor General Bowers was directed to act as a virtual master in chancery to hear the evidence. After taking testimony for two weeks and hearing arguments for two days more, he submitted a report to the President. He found the definition laid down by Attorney General Bonaparte too narrow, though he did not fully accept the broad definition which the distillers had urged. They, in true judicial form, filed exceptions to the Solicitor General's conclusions.

Summoning the Attorney General and the Secretary of Agriculture to sit with him, the President then heard arguments by distinguished counsel for two days. "I want to say that it is not usual for the President, I think, to give hearings of this sort," he said in opening the proceedings at the White House, "but this is in deference to a former experience." After the arguments, he read the 1242 pages of testimony taken by the Solicitor General and wrote an opinion in the approved judicial manner, extending the definition of whiskey beyond that recommended by Bowers. "This opinion will be certified to the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor to prepare the regulation in accordance herewith, under the pure-food law," he concluded. <sup>82</sup>

Generally speaking, however, since the creation of the Department of Justice in 1870, the Attorneys General have come to avoid the ups and downs of the "cabinet council" and, except when directed otherwise, have confined themselves to the administration of justice and the rendition of opinions on questions of law. <sup>83</sup> All executive orders and proclamations prepared by the several officers and agencies of the federal government to be signed by the President are referred to the Attorney General for recommendations as to form and compliance with law—covering matters which range from intra-govern-

<sup>81</sup> *Bates Diary, op. cit.*, 280.

<sup>82</sup> Hearings, *The Meaning of the Term "Whiskey"* (1909), 1243, 1266; *Food and Drugs Act Decisions* (1914), 818, 831.

<sup>83</sup> See Dyer, *op. cit.*, 102-103.

mental procedure to monetary policy and tariff rates. A representative of the Attorney General, moreover, advises on the publication of executive orders and proclamations as well as administrative rules and regulations in the *Federal Register*.<sup>84</sup>

In the preparation or consideration of legislation the Attorney General is frequently called upon by the President to give legal advice and assistance. This function, like recommendations regarding pardons, is a confidential service rendered solely at the request and in aid of the President. There are, in addition, many questions arising in connection with the enforcement provisions of legislation which the Chief Executive or congressional committees necessarily refer to the Department of Justice for comment and suggestions.

The act of 1870 recognized that the Attorney General might refer statutory questions to his subordinates for opinion which, if approved by him, should have the same force and effect as his own opinion.<sup>85</sup> Generally, however, questions submitted have been referred to some officer of the department only for preliminary study and investigation, the final opinions being revised and signed by the Attorney General himself. This preliminary work came to be supervised by the Solicitor General in 1925, and in 1934 the Assistant Solicitor General was given this duty as one of the principal functions of his newly created office.

As *ex officio* legal adviser to all departments of government, manned by public servants of every character and concerned in a multitude of matters touching each vital function of government, the Attorney General deals with legal problems which are magnified by every form of personal and public consideration. Yet the Attorney General, said Cushing, "is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation." William Wirt, who also considered himself acting as a judge when giving opinions and scorned any other course as dishonoring his government, must have stirred in his grave when his daughter nearly fifty

<sup>84</sup> *Preparation, Form, Style, and Safeguarding of Executive Orders and Proclamations*, Ex. Order 6247, Aug. 10, 1933; *Federal Register*, 49 Stat. 500, Sec. 6, July 26, 1935.

<sup>85</sup> 16 Stat. 162, Sec. 4, June 24, 1870.

years later brought pressure to bear through a Chief Justice, a former Secretary of the Navy, and two Attorneys General to secure a favorable opinion regarding the retirement of her Rear Admiral husband."

Sometimes questions are elaborately presented by counsel. Requests from the executive departments are accompanied by briefs and opinions of departmental solicitors. The Attorneys General, of course, follow the Constitution, statutes, and decisions of the courts; and they take into account the opinions of their predecessors, unless error is manifest. Important opinions of general interest are published, unless the officer requesting them objects for good reason. In addition, the rules laid down in Wirt's time to protect the opinion function from the all too frequent opportunity for abuse have continued to govern. Requests for opinions must comply with the statute. Questions must come from and represent actual cases pending for decision in the department concerned. The facts must be stated, for the Attorney General does not sit as a fact-finding officer. Abstract or hypothetical questions are not answered, nor are questions pending in the courts or those of such nature that they should be left to the courts."

"I am of the opinion that the persons charged with the murder of the President of the United States can be rightfully tried by a military court." In 1865, upon the assassination of President Lincoln, Attorney General Speed sent this shortest of the opinions of the Attorneys General to President Johnson. In contrast, the opinion and exhibits submitted by Attorney General Knox in 1902 on the title to the Panama Canal occupy 387 printed pages."

Opinions on constitutionality of acts of Congress are rare. "Ordinarily, I would be content to say that it is not within the province of the Attorney General to declare an Act of Congress unconstitutional," said Attorney General Palmer; "it is the duty of the executive department to administer it until it is declared unconstitutional

\*\* Cushing, *op. cit.*, 333-334 (1854); Black, 9 Op. 97 (1857); Wirt to Calhoun, Feb. 3, 1820, Letter Bk. A-2, 67-69; *Welles' Diary, op. cit.*, III, 85-86.

\*\* Cushing, *op. cit.*, 334; 21 Op. 558 (1897); 28 Op. 596 (1911); and Ch. V, *supra*.

\*\* Speed, 11 Op. 215 (1865), and see Legaré, 4 Op. 144 (1843); Knox, 24 Op. 144 (1902).

by the courts." " Some years before, however, Attorney General Wickersham at the request of President Taft wrote a lengthy opinion on the Webb-Kenyon Act which prohibited the transportation of intoxicating liquors into states where the sale of liquor was illegal. Senators Root and Sutherland had pronounced the measure definitely unconstitutional. "Unless the Supreme Court shall recede from a well-settled line of decisions extending over a long period of years," Wickersham concluded, "it would most certainly declare this legislation to be without the constitutional powers of congress."

Taft agreed that it was an illegal surrender of federal power to the states, for, if the statute were valid, it would permit Congress to "turn the regulation of interstate commerce over to the States." The Supreme Court had declined to express an opinion on the precise point, he said in a veto message sent to Congress on the same day, but one could hardly infer otherwise from the decisions. Indeed, he lectured Congress with some degree of severity for passing an act so clearly unconstitutional. Congress in an obdurate mood passed the law over the presidential veto. The opinions of Taft and Wickersham, said Chief Justice White speaking for the Supreme Court four years later, rested upon "a mere misconception" leading to an "abnormal result." Quite the contrary, he said, "was the express result of the decided cases." " This was a disastrous experience which subsequent Attorneys General—and Presidents—have avoided.

Opinions of the Attorneys General, however, often concern the constitutionality of executive or administrative action. "The law and the Constitution of this country are surely of too much value to be disregarded," said Attorney General Black with characteristic vehemence as he scathingly denounced the secret and summary procedure of a naval retiring board—"a proceeding so grossly illegal that the rottenest monarch in Europe has not seen the like of it for more than a century." " 1

In some great areas of public law, the opinions of the Attorney

<sup>10</sup> Palmer, 31 Op. 475, 476 (1919).

<sup>11</sup> *Webb-Kenyon Act*: Wickersham, 30 Op. 88 (1913); Taft, Cong. Rec. XLIX, 4291, Feb. 28, 1913; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311 (1917).

<sup>12</sup> Black, 9 Op. 212, 216, 218 (1858); and see 11 Op. 209 (1865); 12 Op. 4 (1866); *Cummings to Sec. Treas.*, Aug. 16, 1935, 38 Op. —.

General, if followed by the officers of government, are final in that neither private parties nor public officers have a practical course of appeal to the courts. Where the matter is such that the courts may take jurisdiction, the opinions of the Attorney General serve to guide administrative officers until judicial decision. In the courts, the opinions are given weight and seldom have been overruled."

Nevertheless, it is a constantly mooted question whether public officers must, or should, follow the opinions of the Attorney General on questions of law. There is an obvious desirability of uniform interpretation of the laws in the management of public business, only attainable, in the words of Cushing, "under the guidance of a single department of assumed special qualifications and official authority." \*\* This was the early practice of the government, although the Attorneys General usually considered their opinions advisory only. "The duty of the Attorney General is to advise, not to decide," said Black to Secretary of the Navy Toucey who had been Attorney General nine years earlier. "You may disregard his opinion if you are sure it is wrong. He aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with your own." \*\*

The Department of Justice was created in 1870, however, to secure uniformity of legal opinion. Thereafter the chief law officers

\*\* See *Harrison v. Vose*, 9 How. 372, 384-385 (1850); *The Three Friends*, 166 U. S. 1, 52 (1897); *Denby v. Berry*, 263 U. S. 29, 36 (1923); Black, 9 Op. 268, 269 (1859); *U. S. v. Dietrich*, 126 Fed. 671, 676 (1904). *Opinions overruled*: See *U. S. v. Saunders*, 120 U. S. 126 (1887); *U. S. v. Knight*, 206 Fed. 145 (1913) and 27 Op. 530 (1909); *St. Louis Merchants' Bridge Terminal Ry. Co. v. U. S.*, 209 Fed. 600 (1913) and 25 Op. 411 (1905). See also the Wickersham opinion discussed in the text, *supra*. Compare *Title Guaranty and Trust Co. v. Puget Sound Engine Works*, 163 Fed. 168, 175 (1908), and *U. S. v. Ansonia Brass and Copper Co.*, 218 U. S. 452, 475 (1910); *Evans v. Gore*, 253 U. S. 245 (1920), 13 Op. 161 (1869), and 31 Op. 475 (1919).

\*\* Cushing, *op. cit.*, 334; Johnson, 5 Op. 97 (1849); Black, 9 Op. 32 (1857).

\*\* Butler, 3 Op. 367 (1838); Crittenden, 5 Op. 390 (1851); Cushing, 7 Op. 691 (1856); Black, 9 Op. 32, 36 (1857); Bates to Trumbull, April 13, 1864, Letter Bk. C, 514; but see Wirt to Chairman House Jud. Comm., Mar. 27, 1818, Letter Bk. A-2, 19-23, and Swisher, *op. cit.*, 231. There is a rich discussion on the floor of Congress throughout the early period, generally agreeing that the Attorney General's opinion is either binding or entitled to respect in the executive branch but of course not binding on the legislative branch. "The opinion of the Attorney General may govern the gentlemen from Ohio," said Representative Phelps of Missouri in 1859, "but it will govern me when it is in pursuance of my convictions of right or wrong, and not otherwise. I surrender my opinions as a legislator to no man." Cong. Globe, 35 Cong. 2 Sess., 1533-1540.

took the position that opinions on questions of law were authoritative until withdrawn or overruled in the courts. In addition, this general rule has been prescribed by order of the President and recommended by congressional committee."

Far more important than mere uniformity is the practical desirability, not to say necessity, of securing such legal advice from an independent department not concerned with problems of administrative expediency. Yet legal advice has not escaped the tendency to diffusion inherent in departmentalized public administration. Particularly, as was once the case with public litigation, the Treasury has claimed supremacy in legal opinions where public moneys are involved, although the Attorney General long ago developed special rules of non-interference with the functions of the Comptroller of the Treasury except in important and general questions of law." Indeed, no function of the federal government is carried on without money, and the opinions of the Attorney General necessarily, though often more or less remotely, affect disbursements or collections. Conversely, also, to acknowledge in the Treasury final authority to render opinions in such cases would be to ignore the statutes and practice of a century and a half vesting the opinion function in the Department of Justice.

Nevertheless, when the Comptroller's office was made independent of the Treasury in 1921, that office, under its authority in matters of disbursement and the settlement of accounts, began to render and publish written opinions. On occasion the Attorneys General have been called upon to give opinions touching the same subject matter, which the Comptroller General has repeatedly disregarded but which Congress or the courts have sustained. Indeed, the Comptroller General has intimated that his decisions are not only final and conclusive upon the executive branch of the government but are not properly subject "either to the Supreme Court or the Attorney Gen-

" See Ch. XI, *supra*, and Aldrich, 20 Op. 383 (1892); Whitney, *id.*, 648 (1893); Olney, *id.*, 654 (1893); Moody, 25 Op. 301 (1904); Ann. Reps. Atty. Gen. 1871, 6; 1928, 1-2; but see Brewster, 17 Op. 332, 333 (1882), and Gregory, 30 Op. 314, 316 (1914). See also Ex. Order 2877, May 31, 1918, pursuant to 40 Stat. 556, May 20, 1918; Ann. Rep. Atty. Gen. 1919, 20-21; *Reorganization of Executive Departments*, House Doc. 356, 68 Cong. 1 Sess. (1924), 24.

" See 5 U. S. C. 304, n. 8; Olney, 20 Op. 654, 655 (1893).

eral." " Neither the courts nor the Attorneys General have agreed to this. As in all exercise of public authority, there is undoubtedly a proper division of function, difficult to state in terms but capable of proper solution on a basis of mutual self-restraint.

Despite these aggravations, the opinions of the Attorneys General exhibit an attempt to confine the sprawling mass of public agents and agencies to that conformity with the laws prescribed by the Constitution. Since the Civil War, the Attorneys General have written an average of eighty formal opinions a year, the more important of which, like the decisions of the courts, have been published." In addition, hundreds of opinions on land titles, as well as informal or confidential memoranda on legislation and proposed administrative action of every type, are prepared annually.

Not only is the scope of the opinions of the Attorney General co-extensive with the broad field of federal activities but in practice it also includes the more difficult problems arising in the administration of the national laws. The questions deal with the powers and duties of public officers, and comprise a large, and so far unexplored, part of the materials in the field of administrative law. They deal as well with the great and historic subjects of national concern—foreign affairs, slavery, revenues, lands, Indians, military power, civil rights, labor, the mails, interstate commerce and transportation, the courts and the Congress, and a host of other federal subjects.

In times of great public crisis, legal advice is needed to break the log-jam of doubt, uncertainty, and reluctance. When the banking troubles of 1933 reached an alarming stage, President Hoover and then President Roosevelt turned to their Attorneys General for advice on the scope of emergency powers. When Attorney General Mitchell and Senator Walsh, the new Attorney General-designate, were respectively eliminated by the fortunes of politics and by sudden death, a new Attorney General was thrust into the breach to assist the new

" McCarl, *Jurisdiction of the General Accounting Office—Relief of Disbursing Officers* (1924), 3 Comp. Gen. 771; and see McGuire, *Legislative or Executive Control over Accounting for Federal Funds* (1926), 20 Ill. L. Rev. 455; McGuire, *Accounting Officers and Judicial Precedents* (1925), 19 Ill. L. Rev. 523. But see 36 Op. 289, 296 (1930); Miguel v. McCarl, 291 U. S. 442 (1934); Opinion Atty. Gen. to Sec. War, Oct. 7, 1935.

" Ann. Repts. Atty. Gen. 1871, 1; 1907, 13; 1910, 35; 1930, 12; 1934, 119; 1935, 130.



administration to avoid legal pitfalls in allaying public hysteria, protecting the commercial life of the country, and preserving the private banking system."

Conflicting political claims and popular desires, together with the susceptibility of legal reasoning to misconstruction and misapplication, make the giving of legal advice a serious undertaking in any circumstances. At the same time, a government of laws and developing federal administration are constantly expanding the field and the need for sound legal opinion. Interpretation of the laws for purposes of public administration must be placed somewhere, and one hundred and fifty years of law and practice have confirmed the view that it belongs with separate officers, in the words of the still operative Judiciary Act of 1789, "learned in the law."

\*\* See Roosevelt, *On Our Way* (1934), 3-8; Lindley, *The Roosevelt Revolution* (1933), 58, 78, 79, 81-82, 92-93, 251, 272.

## CHAPTER XXIV

### THE ULTIMATE SANCTION

"THE judicial department," said Justice Miller in 1882, speaking for the Supreme Court, "is inherently the weakest of them all." The enforcement and protection of judgments of courts, he pointed out, are dependent upon officers appointed and removable at the pleasure of the executive. "With no patronage and no control of the purse or the sword," he continued, "their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives."<sup>1</sup>

The commands of the courts, issued in the form of orders, judgments, or decrees, even now must be carried into effect by the United States marshals, who are supervised by the Attorney General. Similarly, the appropriation and disbursement of funds for the maintenance of the courts are dependent upon the will of Congress and the efforts of the executive.<sup>2</sup> However, the performance of these services for the courts has become a matter of custom and routine. Other more important judicial problems have weighed upon the executive from the earliest times.

Since the United States has been the largest and most prolific litigant in the federal courts, naturally the attention of its non-judicial

<sup>1</sup> *U. S. v. Lee*, 106 U. S. 196, 223 (1882); and see *Ex parte Grossman*, 267 U. S. 87, 120 (1925).

<sup>2</sup> In labor disputes the enforcement of judicial orders has not always proceeded as a matter of course. Attorney General McReynolds and Solicitor General Davis refused the appointment of deputy marshals for this purpose. Attorney General Mitchell took the view that he was obligated to make the appointments on the request of the courts. *Bonaparte*, D. J. Files 16-4, 16-6, and 16-25; *Wickersham*, *id.*, 16-21; *McReynolds* and *Davis*, *id.*, 16-32, 16-40, 16-41, 16-83, 16-122, and 16-129; *Daugherty*, *id.*, 16-155-25, Sec. 2; *Mitchell*, *id.*, 16-181; and see *id.*, 16-207, 16-208, and 95-12-14, Sec. 1; *Witte, The Government in Labor Disputes* (1932), 113-114, 116-117; see Ch. XXI, *supra*.

law officers is drawn to the organization and functioning of the judicial hierarchy. The first problem always has been the need for a sufficient number of courts. Too many accept as commonplace the theoretical availability of tribunals of justice, whereas in fact through the greater part of American history there has been a great need for judicial tribunals. "Our Court is a gilded shadow," said Roscoe Conkling in the House in 1862; "its places of sitting are so remote from the homes of suitors, so remote from the residences of witnesses, that it travels beyond the convenient reach, almost beyond the ken of those entitled to have their convenience consulted." \*

The Judiciary Act of 1789, which provided as well for United States attorneys, marshals, and an Attorney General, contained the germ of organization which, much amplified by subsequent legislation, has since prevailed for the federal judicial system. Congress there provided for district courts distributed among the states, for three circuit courts to be manned by two justices of the Supreme Court and one district judge, and for a Supreme Court to top the system. The justices of the Supreme Court thus served upon two tribunals and were required to "ride circuit." †

A year later, in response to a resolution of the House of Representatives, Attorney General Randolph, while persuaded that time and practice alone could mature the judicial system, advised that justices of the Supreme Court ought not to man the lower trial courts also." Congress, however, did not do away with the circuit riding of Supreme Court justices. The five judges could hold just so many courts because of the sheer physical difficulties of travel; so far as there was need for further courts, wrongs had to go unredressed.

The new justices were drawn immediately into the politics of Federalism and Anti-Federalism. On circuit, their charges to juries were utilized for partisan purposes. Their field service was severe. The Supreme Court members immediately and repeatedly submitted to President Washington demands for relief. "The task of holding

\* Cong. Globe, 37 Cong. 2 Sess., 2568; see also *id.*, 27 Cong. 3 Sess., 297-298.

† Constitution, Art. I, Sec. 8; 1 Stat. 73, Sept. 24, 1789; see Frankfurter and Landis, *The Business of the Supreme Court* (1928), and Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).

\* Am. St. Papers, Misc., I, 21, 23-24.



#### THE STORY OF THE SEAL OF THE DEPARTMENT OF JUSTICE

Several forms of seal (authorized by 9 Stat. 347, Feb. 22, 1849, and 17 Stat. 35, March 5, 1872) have been used since the middle of the nineteenth century. The Latin inscription is a never-ending source of speculation. "According to a Department tradition, it was suggested to Attorney-General Black by a passage in Lord Coke's Institutes, Part 3, folio 79, which reads thus: 'And I well remember, when the Lord Treasurer Burleigh told Queen Elizabeth, Madame, here is your Attorney-General (I being sent for) *qui pro domina regina sequitur*, she said she would have the records altered; for it should be *attornatus generalis qui pro domina veritate sequitur*.' \* \* \* It is translated, 'who (the Attorney-General) sues for (or on behalf of) our lady the Queen.' \* \* \* Our word 'sue' comes from '*sequor*.'" (D. J. Misc. Bk. No. 22, 353.) Dean Pound has explained the inscription thus: "The motto is taken from the commencement of a pleading in a proceeding by the Attorney General at common law. You will remember that until the reign of George the Second, all pleadings were in Latin. The Attorney General began, 'Now comes so and so, Attorney General, who prosecutes on behalf of our Lord, the King.' In the reign of Elizabeth, of course, this would have been 'who prosecutes on behalf of our Lady, the Queen.' *Domina Justitia*—Our Lady Justice—was substituted for our Lady the Queen, or our Lord the King. In other words, the seal asserts that the Attorney General prosecutes on behalf of justice. \* \* \* The passage in Coke's Third Institute means that when the Lord Treasurer introduced Coke as Attorney General to Queen Elizabeth he said in Latin, 'Here is your Attorney General *qui pro domina regina sequitur*,' that is, who prosecutes for our Lady the Queen. Elizabeth, who was an excellent scholar, answered, 'It should be, Attorney General who prosecutes for our Lady the Truth.'" (D. J. File 44-9-2, Sec. 1.) To regularize minor heraldic details, President Franklin D. Roosevelt on April 27, 1934, by executive order approved the seal in the form shown above.

The Department also has a flag of blue with a star in each corner, the arms as shown on the seal in the center, and the motto beneath on a scroll. (D. J. File 44-9-2, Sec. 2.)



twenty-seven Circuit Courts a year, in the different States, from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year," they declared, "is a task which, considering the extent of the United States, and the small number of Judges, is too burdensome." Nevertheless, each justice, with little relief, continued to lead, as a relative put it, "the life of a Post-boy." Although the act of 1801 provided for the elimination of circuit riding, the design of the departing Federalists to fill up by last-minute appointments the sixteen substitute circuit judgeships and the attempted appointment of the "midnight judges" marked the measure for prompt repeal by the Jeffersonians.\*

Without courts, there could be no decision of controversies. Why so curious a limitation on federal justice? Because through the courts the powers conferred by the Constitution were exercised and, to the extent that they were exercised, the powers of the states were reduced. "This extensive machine, moving under the weight of a column of supernumerary judges, attended with the immense expense of their establishments, it is feared would ultimately reduce the people to the most abject state of servitude," said the Boston *Independent Chronicle* of the ill-fated judiciary act of 1801. "Lawyers would generate in tenfold proportion to other professions, and in time the country would be as generally overrun by this 'order' as Egypt with Mamelukes"

Soon the Supreme Court announced the doctrine of judicial review in *Marbury v. Madison*. "The efforts of Federalism to exalt the Judiciary over the Executive and Legislature, and to give that favorite department a political character and influence," said the same paper, "will probably terminate in the degradation and disgrace of the judiciary" Chief Justice Marshall's opinion stated that the courts could require the Secretary of State to act. "The attempts of the Supreme Court of the United States by a mandamus to control the executive functions is a new experiment," concluded the *Independent*.

\* Warren, *The Supreme Court* (1922), I, 59 n, Brown, *Life of Oliver Ellsworth* (1905), 245, *Correspondence and Papers of John Jay* (1890-1893), III, 387, 478, McRee, *Life of Iredell* (1858), II, 347 *et seq*, Am St Papers, Misc, I, 52, 77, Ann. Cong, III, 611, 671, *id*, IV, 45, 109, 457, McRee, *op cit*, 306, see Ch IV, *supra*.

"It seems to be no less than a commencement of war between the constituted departments." The situation was such that Jay declined reappointment to the federal judiciary. "Under a system so defective, it would not obtain the energy, weight and dignity, which were essential to its affording due support to the National Government," he thought, "nor acquire the public confidence and respect which, as the last resort of the justice of the Nation, it should possess." <sup>7</sup> These events were not conducive to the establishment of new courts adequate to serve the nation.

Nevertheless, as the frontier pushed westward, a few circuit and district courts had to be created. The new circuits required additional Supreme Court justices and increased both the distances to be travelled and the volume of appeals to the Supreme Court proper. However, to increase the number of justices of the Supreme Court would transform it, said Attorney General Cushing later, "irresistibly from a court into a senate." Congress merely lengthened the session of the Court. President Jackson repeatedly reminded Congress that one-fourth of the states did not have the services of a circuit court at all. Finally, in 1837, the membership of the Supreme Court and the number of judicial circuits were increased to nine, giving the West two circuits and adding eight states to the circuit system.<sup>8</sup>

Then the Supreme Court began to fall into serious arrears in its work. For the first time arguments in the Court were limited by rule to two hours a side. President Pierce repeatedly urged reform. In response to a Senate resolution, Attorney General Cushing, while suggesting the retention of circuit duties for the Supreme Court justices, recommended the appointment of assistant circuit judges and the withdrawal of circuit powers from district judges. "Modifications of the judicial system," said he, "are imperatively demanded, not merely to give to the system completeness according to the present number of States, but to enable it, though but partially, yet at all, to discharge its appropriate functions." However, the slavery issue

<sup>7</sup> *Marbury v. Madison*, 1 Cranch. 137 (1803); Warren, *History of the American Bar* (1913), 251, 253, 264-265.

<sup>8</sup> Cushing, Sen. Doc. 41, 33 Cong. 1 Sess., Feb. 4, 1854; length of sessions, 4 Stat. 160, May 4, 1826, and 5 Stat. 676, June 17, 1844; Jackson, Richardson, *op. cit.*, II, 558, 605, and III, 117, 177; new justices and new circuits, 5 Stat. 176, Mar. 3, 1837.

crowded aside the problems of judicial organization, except that far-off California was given a circuit court and a separate circuit judge.<sup>9</sup>

Following the Civil War, the dockets of the federal courts became crowded beyond all precedent. While bills were introduced in Congress, the desire to deprive President Johnson of patronage and fear of the Supreme Court's treatment of the reconstruction program delayed action. Finally in 1869 the justices were relieved of circuit duty save for one term every two years, and nine new circuit judge-ships were created.<sup>10</sup> Yet the effect upon the increasing volume of business was hardly perceptible.

The next year saw the creation of the Department of Justice and the first attempt to secure the regular compilation of judicial statistics. In 1875, while some classes of cases that might come before the Supreme Court were limited, others were added, and both the Supreme Court and the lower federal courts fell more and more in arrears.<sup>11</sup> There were diverse proposals for reform, but between them legislative agreement could not be reached. Opinions differed basically as to whether the proper remedy lay in increased judicial facilities or in limitation upon federal jurisdiction in favor of the states.

Beginning in 1877 the Attorneys General championed with increased vigor the need for reform in the judicial system and recommended the creation of new appellate courts intermediate between the Supreme Court and the trial courts. In 1885 Attorney General Garland proposed the system existing today—district courts as "courts of original jurisdiction," the circuit courts manned by separate judges to exercise "appellate jurisdiction," a Supreme Court to pass on fewer cases "upon simpler records involving purely questions of law." Nothing was done, and Attorney General Miller in 1889 again reminded Congress that judicial congestion was an evil which amounted to a complete denial of justice. In the same year, Presi-

<sup>9</sup> Arguments, Court Rule No. 53, 7 How. (1849), 8 How. (1850); Pierce, Richardson, *op. cit.*, V, 217, 292; Cushing, Ex. Doc. 41, 33 Cong. 1 Sess., Feb. 4, 1854; California, 10 Stat. 631, Mar. 2, 1855.

<sup>10</sup> See 14 Stat. 209, Sec. 1, July 23, 1866; 16 Stat. 44, April 10, 1869.

<sup>11</sup> Judicial statistics, 16 Stat. 162, Sec. 12, June 22, 1870, and see Sen. Res., Sen. Jr., 38 Cong. 1 Sess., 296 (1864) and Sen. Ex. Doc. 1, 38 Cong. 2 Sess.; limitation and increase of Supreme Court jurisdiction, 18 Stat. 315, Feb. 16, 1875, and 18 Stat. 470, Mar. 3, 1875.



dent Harrison also recommended a system of intermediate appellate courts.<sup>18</sup>

Finally, one hundred years after Attorney General Randolph's recommendations, intermediate appellate courts were established in 1891, and the pressure of business was relieved just in time to meet an accelerated growth of population, commerce, and legislation. Arrangements were made for the care of government cases in the new courts, and very soon the Attorneys General were moved to recommend the appointment of additional judges. Procedure, the terms and places of holding court, and the functions of clerks and deputies all required additional legislation. Further limitations on the work of the Supreme Court became necessary in some fields, while justice demanded an expansion of jurisdiction in others. However, it was not until 1911 that the old circuit courts, whose limited appellate jurisdiction had been transferred to the new circuit courts of appeal, were abolished as a final measure of reform.<sup>19</sup>

There followed the movement for the creation of specialized courts, such as the short-lived commerce court, and further limitations on appeals to the Supreme Court. To meet conditions after the World War, the Attorney General appointed a committee to study and report on the needs of the federal judicial system. He and his committee then recommended additions to the number of district judges and provision for their assignment from time to time to the more congested districts. At the suggestion of Chief Justice Taft, provision for a federal judicial council was added; and with some modifications the proposals became law in 1922.<sup>20</sup>

After 1924, the reports and recommendations of the Judicial Conference were published in the annual reports of the Attorney General, though the conference requested legislative authority to make recommendations directly to Congress. The Supreme Court, however, was still faced with arrears of business. The justices themselves

<sup>18</sup> Ann. Reps. Atty. Gen. 1877, 11; 1878, 6; 1879, 8; 1880, 7; 1881, 6; 1882, 6; 1885, 36; 1886, 18; 1887, 15; 1888, 14; 1889, 18; 1890, 18; Harrison, in Richardson, *op. cit.*, IX, 42-43.

<sup>19</sup> 26 Stat. 826, Mar. 3, 1891; Ann. Reps. Atty. Gen. 1891, 5; 1892, 4-5; 36 Stat. 1087, Sec. 289, Mar. 3, 1911.

<sup>20</sup> *Hearings on S. 2432, 2433, 2523*, 67 Cong. 1 Sess. (1921); Cong. Rec., XLII, 202, Dec. 10, 1921; 42 Stat. 837, Sept. 14, 1922; Ann. Reps. Atty. Gen. 1919, 3; 1920, 4; 1921, 3; Taft to Sol. Gen., Jan. 19, 1922, D. J. File 72868-40-85, Sec. 2.

then proposed and secured legislation, known as the "Judges' Bill," to limit and control still further the volume of appeals to the Supreme Court.<sup>15</sup>

A constant stream of proposals affecting the courts is referred by Congress to the Attorney General for comment and suggestions. Congress and the executive must provide the tools for judicial craftsmen, and the law officers must exercise their powers to conserve the time and limit the dockets of appellate tribunals. The terms and places of holding courts must be specified. The districting of states for purposes of administration of federal justice must be studied, and new courts must be organized. More important than all of these, however, is the need for additional judges, constantly brought to the attention of Congress.<sup>16</sup>

Even when judicial positions are created, the selection of judges is an executive duty of the greatest moment, requiring time, deliberation, consultation, and the consent of the Senate. Indeed, respectable volumes have been written to prove the obvious fact that the law must be applied by mortal men acting under rules that are necessarily flexible, not to say of "convenient vagueness."<sup>17</sup> Upon the discriminating choice of judges necessarily depends the quality of federal justice.

The Constitution provides that the President shall nominate and appoint the justices of the Supreme Court "by and with the Advice and Consent of the Senate," and Congress has left judges of the lower federal courts to be appointed in the same fashion. So in Pacific railroad days James A. Garfield, about to become President, had written Whitelaw Reid, the editor of the *New York Tribune* and a prominent party leader, to assure him that vested rights would be protected in filling vacancies on the Supreme Court.<sup>18</sup> And so President Theodore Roosevelt argued with Senator Lodge

<sup>15</sup> Ann. Reps. Atty. Gen. 1924, 1; 1930, 4; 1931, 4; 1932, 6; 1933, 5; 43 Stat. 936, Feb. 13, 1925.

<sup>16</sup> *Additional judges*: Ann. Reps. Atty. Gen. 1880, 7; 1881, 6; 1905, 5; 1915, 9; 1916, 9; 1917, 9; 1918, 8; 1921, 3; 1924, 1; 1925, 5; 1926, 5; 1927, 3, 4; 1928, 3; 1930, 2, 4; 1931, 4, 4; 1932, 6; 1933, 4; 1934, 1, 5; 1935, 2, 5; Hand to Wickersham, Nov. 20, 1911, D. J. Pers. Files, N. Y.

<sup>17</sup> Hough (Federal Judge), *Due Process of Law—Today* (1919), 32 Harv. L. Rev. 218; compare Boudin, *Government by Judiciary* (2 vols. 1932).

<sup>18</sup> Sept. 2, 1880, Garfield Papers, Lib. Cong., by permission of H. A. Garfield.

the fitness of Judge Lurton for the Supreme Court. "He is right on the negro question; he is right on the power of the Federal Government; he is right on the insular business; he is right about corporations; and he is right about labor. On every question that would come before the bench he has so far shown himself to be in much closer touch with the policies in which you and I believe than even White, because he has been right about corporations, where White has been wrong." But, replied the Senator, "I do not see why Republicans cannot be found who hold those opinions as well as Democrats. The fact that there have been one or two Republican disappointments does not seem to me to militate against the proposition."<sup>19</sup>

In an earlier day of fewer judges, the President could handle all routine connected with appointments. Of course, members of the cabinet often advised with him on judicial appointments and all manner of judicial matters. Attorney General Randolph in 1794, for example, objected to the appointment of Chief Justice Jay as special representative to England, because it was bad precedent that a chief justice "should be taught to look up for *executive* honors."<sup>20</sup>

The year before, Randolph had been directed to look into a list of candidates for the bench. Mr. Cook, he reported, had no just pretensions to eminence; Mr. Chase was of indifferent elocution and his knowledge of the law scarcely placed him on the roll of fame; Mr. Huston was a good county court lawyer; Governor Patterson was clear in all respects save that he might have some connection with the land companies; and Mr. Potts was a valuable man of universal esteem and a much approved practitioner. Randolph cautioned Washington against provoking state dissatisfaction by the appointment of incompetent federal judges. "If such an idea gains ground," he warned, "the state judiciaries will inevitably make a stand against the federal bench."<sup>21</sup>

Thirty years later, when the Federalists were not in favor, Attorney General Wirt unsuccessfully recommended Chancellor Kent

<sup>19</sup> Sept. 4 and 6, 1906, *Roosevelt-Lodge Correspondence*, *op. cit.*, II, 228-230, and see also *id.*, I, 22-23, 518-519.

<sup>20</sup> Conway, *op. cit.*, 220.

<sup>21</sup> Feb. 18, 1793, *Washington Papers*, Lib. Cong., CCLVIII, No. 259-260.

for the Supreme Court. "Can you make an appointment more acceptable to the nation than that of Judge Kent?" he asked of President Monroe. True, one of the New York factions would take it in high dudgeon. "Probably, too, some of the most heated republicans and interested radicals who seize every topic for cavil, might, in every quarter of the Union, harp a little." Yet, he continued, "The appointment of a judge of the Supreme Court is a national and not a local concern." It was now apparent that the functions of the Supreme Court were among the most difficult and "perilous" to be performed under the Constitution. "They demand the loftiest range of talents and learning and a soul of Roman purity and firmness," he concluded. "The questions which come before them frequently involve the fate of the Constitution, the happiness of the whole nation, and even its peace as it concerns other nations." \*\*

It soon became necessary for the President to delegate the routine in connection with appointments. At first this was centralized in the Department of State. So far as law officers and judges were concerned, Attorney General Cushing caused it to be transferred to the Attorney General's office in 1853. In 1863, however, Attorney General Bates complained that the Secretary of the Treasury had not only filled all offices in his own vast patronage with extreme partisans but contrived also to fill many judicial vacancies "without any reference to legal and judicial qualifications." When Lincoln discussed appointing Evarts to the chief justiceship, Secretary of the Navy Welles warned that the place required not only a prominent lawyer but a judicial mind, upright and of strict integrity, "a statesman and a politician." \*\*

Time, practice, and the necessities of the case have finally centralized in the Department of Justice the duty of investigating and recommending judicial appointments. There it is performed solely as a confidential service in aid of the President. "My function, in connection with the filling of judicial appointments," said Attorney General Wickersham when pressed to support a candidate for judi-

\*\* Kennedy, *op. cit.*, II, 134.

\*\* Ch. VIII, *supra*; Cushing, *op. cit.*, 350; Ann. Rep. Atty. Gen. 1887, 16, 21-22; 25 Stat. 387, Aug. 8, 1888; Bates, *Diary*, *op. cit.*, 310; Welles, *Diary*, *op. cit.*, II, 181-182; Roosevelt-Lodge Correspondence, *op. cit.*, I, 518-519; *id.*, II, 374.

cial office, "is quasi-judicial in itself, and I must consider all the candidates without any commitment to any one of them." <sup>24</sup>

The serious nature of the function of appointing judges has come to be generally recognized in principle, whatever the results may have been in practice. President Harding, in transmitting a recommendation, wrote his Attorney General that it might be wise to make inquiry. "Of course," he continued, "there is strong appeal made to me by the statement that Mr. — is both a Baptist and a Thirty-second degree Mason, but you know how I feel about the high character of judicial nominations." Daugherty agreed, "to the end that the judiciary shall stand for years as an example and a sustaining force in the government." <sup>25</sup>

"We must have," Attorney General Miller had said thirty years before, "the best man that can be found for that place, and we must not appoint anyone that we will be called upon to defend at once against charges of unfitness for the place." Many pitfalls beset the candidate for consideration and the appointing power alike. "Appoint him for Bunny's sake," pleads a friend. Another warns that unless unfitness can be demonstrated publicly, a refusal of judicial office will work injury to the administration "and especially to the President personally." Unreasonable opposition, Attorney General Wickersham wrote, "makes it so difficult for the appointing power to deal fairly and justly with such questions, because one's strong inclinations, in the face of such criticism, is to appoint the man because of it." <sup>26</sup>

Judges are usually selected from the President's political party.<sup>27</sup> Within that party, in addition to considering ability and fitness, the Presidents have sought men under sixty years of age, in view of the retirement provisions for federal judges and public criticism of aged and infirm judges. Yet the Presidents have made a few exceptions, which have come to haunt the appointing power. Hard cases,

<sup>24</sup> Oct. 23, 1911, D. J. Pers. Files, S.D.N.Y.; see also Williams, Feb. 6, 1873, Letter Bk. I, 588.

<sup>25</sup> Letters of April 6 and 8, 1922, D. J. Pers. Files, Ariz.

<sup>26</sup> Miller, Dec. 1, 1890, Ex. and Cong. Letter Bk. No. 4, 150; to Daugherty, Jan. 29, 1923, D. J. Pers. Files, Ohio No. Judges; to Taft, Feb. 4, 1911, *ibid.*; Wickersham, Jan. 31, 1912, *id.*, S.D.N.Y.

<sup>27</sup> See Bonaparte to Hale, Aug. 2, 1907, *id.*, Fla. No.; Miller to Harrison, Feb. 13, 1890, Ex. and Cong. Letter Bk. W, 99.

too, are put forward. "Mr. — is a veteran of the civil war," wrote a Senator to President Taft. "I regard him as in a preeminent degree fitted for the place. I was myself an humble private and non-commissioned officer for over three years in that war. Under these circumstances I can not find it in my heart to present or recommend any one else to you for that place. You have the power to overrule me, but if you do, I shall feel that I have been discriminated against and been humiliated, both here and among the people of Minnesota." \*\*

Others have attacked the problem of age from another angle. "Worn out judges ought to be respectably provided for, by allowing them to resign upon a competent pension," recommended Attorney General Bates. After a retirement law had been passed, Attorney General McReynolds recommended in 1913 that when any federal judge, except justices of the Supreme Court, failed to avail himself of the privilege of retiring at the age provided by law, the President should appoint another judge to preside over the affairs of the court and have precedence over the older one. "This," said he, "will insure at all times the presence of a judge sufficiently active to discharge promptly and adequately the duties of the court." \*\*

Transcending all problems of appointment, however, is the necessity of securing the advice and consent of the Senate in judicial appointments. With the development of the rule of senatorial courtesy, whereby the Senate will not confirm nominations unless the interested local Senators of the President's party assent, a problem of first magnitude constantly confronts the Chief Executive. When President Roosevelt, in 1906, asked Senator Platt to state his objections to a proposed nominee, the Senator replied that his mere preference ought to suffice. "Political considerations," he continued, "operate strongly upon my mind." The nominee's "affiliations" were disagreeable, and his appointment would be "most distasteful" and an "affront" to the senior Senator from New York.<sup>80</sup> The letter precipitated a tempest.

"It is my business to nominate or refuse to nominate and yours,

<sup>80</sup> Bonaparte, Feb. 26, 1907, D. J. Pers. Files, Mo. E. Judges; to Taft, Mar. 10, 1909, *id.*, Minn.

<sup>81</sup> *Bates Diary, op. cit.*, 322; Ann. Repts. Atty. Gen. 1913, 5; 1914, 10.

<sup>82</sup> June 15, 1906, D. J. Pers. Files, Minn.

together with your colleagues', to confirm or refuse to confirm," replied the President. If both did their duty, then each would endeavor to obtain the best man for the position and neither would insist upon any man for merely personal reasons. "I have not considered my own individual preference," said Roosevelt, "and I cannot consider yours." Moreover, the initiative in such cases must properly lie with the President and not the Senator.<sup>21</sup>

"You are proposing to humiliate me," replied the Senator. "It would not only be absurd but wicked," retorted the President, "to make the citizens of New York and the bar of New York feel that no man had any chance for an appointment to a judgeship unless he should be selected as a matter of favoritism and personal pride, whether by you or by me." <sup>22</sup> The nomination was sent to the Senate, and there confirmed.

President Taft and his successors generally have fared less well, despite some public sympathy. The New York *World* on March 30, 1909 reported that Taft proposed to make his own selections for the bench, and predicted a day of Senate storm and tempest when the President would have a chance to show "whether he be iron or jelly." It would be better for the public if those judges were elected, said the *World*. "As long as they are produced by present methods, however, public interests will be safer if the President, not the Senate, picks them out."

In the next administration, Attorney General McReynolds wrote Senator Lewis in 1913 that he would be very glad to have the benefit of the Senator's information and suggestions but refused to furnish the names of candidates, "particularly as it has long been the policy of this Department to consider application papers as confidential, and not to furnish lists of applicants." Forty-five years before, at the direction of President Grant, Attorney General Hoar had refused a similar request from Senator Trumbull—and thereafter Hoar's own nomination to the Supreme Court was stubbornly rejected by the Senate.<sup>23</sup>

In 1917, after an exchange of increasingly vexed letters, Senator

<sup>21</sup> June 17, 1906, *ibid.*

<sup>22</sup> June 18, 1906, *ibid.*

<sup>23</sup> McReynolds to Lewis, May 2, 1913, D. J. Pers. Files, Ill.; Hoar to Trumbull, Dec. 11, 1869, Letter Bk. H, 145; Storey and Emerson, *op. cit.*, 180-198.

Smith of Georgia informed Attorney General Gregory that the law placed the responsibility upon Senators to *advise* as well as to *consent* to judicial appointments—which “justifies the President in placing this responsibility upon senators.” In this view the Attorney General did not concur. “The trouble with the Senators from Georgia,” wrote President Wilson, “is that they have taken the position that I have no right to name anyone whom they have not suggested.”<sup>84</sup>

Attorney General Daugherty was convinced that the Senators should be given to understand that judicial appointments were not “party patronage.” A Congressman disagreed, “I am the one who is going to be held responsible . . . for the appointment and the one who must go before the people.”<sup>85</sup> Similarly, Senator Fess requested Attorney General Stone for the evidence upon which Fess’ own nominee was rejected. “This is not because of his disappointment or my humiliation before the people of my State,” said the Senator, “but wholly in the interest of fairness.” Senator Edge, in another case, wrote that he would not change his mind and that he was prepared to assume the responsibility for recommendations. “While I appreciate a Senator has not the power of appointment, since time immemorial Senators have been called upon to make recommendations to fill vacancies within their State.” But he wanted his “recommendations” to be controlling; otherwise, he said, he and his friends would be placed in a “most trying and unenviable position.”<sup>86</sup>

These are but samples of the public records. Manifest public duty has prevented the complete abdication of the appointing power to the Senate. “The view of the practical politician,” wrote Elihu Root in 1904, “seldom agrees with that of the Bar; but long years after an administration has passed away, a good or a bad judge remains as a monument and a witness to the character of the administration.” This had been the warning of Attorney General Wirt to President Monroe, more than eighty years before. History lays hold upon appointments, he had said, “and deduces from them the char-

<sup>84</sup> Letters of Mar. 17 and 19 and July 5, 1917, D. J. Pers. Files, Ga.

<sup>85</sup> Daugherty to Harding, April 19, 1922, *id.*, Ariz.; Leavitt to Daugherty, Dec. 17, 1923, *id.*, Mont.

<sup>86</sup> Fess to Stone, Feb. 3, 1925, *id.*, Ohio; Edge, May 8, 1925, *id.*, N. J.



acter of the appointing power." He knew, however, that there must be some sacrifice to popular prejudices, "even to enable the President to mitigate the rage of party itself." "

The problem is more than one of wise choice, firmness in the executive, or reasonableness on the part of Congress, for in the storm of politics qualified candidates are often scarce. Attorney General Stone strove to attract competent men and tried to argue them out of their reluctance to serve for the small salaries. "You have probably more money now than you need, and I think our profession ought to place opportunity for judicial service ahead of the opportunity for accumulating a fortune," he argued on one occasion. "Unless someone is willing to do it, what is to happen to our bench and to our legal system?" "

The problems of personnel, however, are not confined to the appointment of judges. Soon after the Civil War, growing abuses of subordinate officials of the federal courts led to criminal prosecutions, restrictive legislation, and a degree of direct supervision by the Department of Justice. The Judiciary Act of 1789 had provided the Supreme Court and each district court with a clerk, appointed by the judges, to enter and record all the orders, decrees, judgments, and proceedings. In 1839 the circuit courts were given separate clerks, but clerks often served two or three courts as well as other offices despite the growth of judicial business and additional duties imposed upon them from time to time."

In many instances the judicial records of the United States were kept either poorly or not kept at all, funds were wasted or disappeared, and accounts were neglected entirely. Although public funds in the custody of these officers were the subject of much legislation, the Attorneys General were forced to make numerous appeals to Congress for the proper security of such moneys. In 1842 the Treasury was authorized to require an accounting of fees which the

" Root, April 7, 1904, *id.*, Pa.; Kennedy, *op. cit.*, II, 134-135.

" Stone, Jan. 15 and 16, 1925, D. J. Pers. Files, N. Y.; Wickersham to Hand, Nov. 22, 1911, *ibid.*

" 1 Stat. 73, Sec. 7, Sept. 24, 1789; 5 Stat. 321, Sec. 2, Feb. 28, 1839; 26 Stat. 826, Sec. 2, Mar. 3, 1891; Ann. Reps. Atty. Gen. 1878, 11; 1891, 27; 41 Stat. 1413, Mar. 4, 1921.

clerks collected from litigants, and of expenses of the clerks' offices—a duty which was transferred to the newly created Department of the Interior seven years later until, with the creation of the Department of Justice in 1870, it was transferred to the Attorney General.

The clerks still refused to report or account. They were appointed and removable only by the judges. Where gross neglect of duty appeared, the Attorney General could only threaten to request the judge of the court to make a change in the clerk's office.<sup>40</sup>

In 1875 the Attorney General was authorized to institute judicial proceedings to compel the clerks to perform their duties, refusal or neglect of duty was made a crime, and the President was empowered to remove clerks from office. Even then, particularly because the clerks were entitled to retain some of their fees as compensation, abuses persisted. For half a century the Attorneys General brought to the attention of Congress the iniquities of the fee system of compensation. "The judges," reported Attorney General Wickersham in 1911, "have not always cooperated with the department in its efforts to correct irregularity." Two years later Attorney General McReynolds recommended that the clerks be appointed by the judges for specified terms with the consent and approval of the Attorney General and subject to removal by the President for cause at any time. Finally, in 1919, the clerks were put on a salary basis, to be adjusted by the Attorney General, and the appointment and compensation of deputies and clerical assistants were made subject to regulation by the Attorney General.<sup>41</sup>

More seriously objectionable practices came to light among the "commissioners" of the federal courts. The preliminary examination of persons arrested and the taking of depositions in civil cases had always required the constant services of petty judicial officers. In

<sup>40</sup> Miller to Sec. Treas., May 9, 1892, Ex. and Cong. Letter Bk. No. 9, 452; Atty. Gen. to U. S. Atty., Dec. 10, 1917, D. J. Pers. Files, Alaska; Circular to clerks, Feb. 12, 1873, Letter Bk. I, 596-597; on records and accounts, the great numbers of recommendations and statutes begin with the founding of the government and extend well into the twentieth century.

<sup>41</sup> Ann. Reps. Atty. Gen. 1870, 2; 1871, 8; 1872, 10; 1873, 7; 1874, 19; 1875, 6; 1876, 7; 1877, 9; 1878, 12; 1879, 13; 1880, 13; 1881, 12; 1882, 12; 1883, 14; 1884, 13; 1885, 13; 1886, 11; 1890, 20; 1896, 11; 1897, 25; 1911, 22; 1913, 5, 49; 1915, 13; 1916, 12; 1917, 12; 1918, 11; 1923, 3; 1924, 4; 1926, 2; 1929, 6; 18 Stat. 333, Secs. 4-6, Feb. 22, 1875; 40 Stat. 1182, Feb. 26, 1919.

England, in the colonies, and in the states the judges of course were not always available in each locality. Accordingly, local magistrates—such as the coroner and justice of the peace—were given preliminary powers of examination, commitment, bail, and the taking of depositions in order to care for the daily demands of justice in each community.

The Judiciary Act of 1789 had provided that in federal cases depositions might be taken and persons arrested and imprisoned or bailed by judges and magistrates of the states as well as by judges of the United States. However, the simple expedient of relying upon the borrowed and grudgingly given services of state officials became insufficient, and beginning in 1793 the federal courts were authorized to deputize these powers upon "one or more discreet persons learned in the law in any district."<sup>44</sup> These appointees early came to be called "commissioners," as were similar petty judicial officers in England and the colonies. Today they exercise additional special powers—such as the issuance of search warrants and warrants of arrest under the internal revenue, liquor, coinage, immigration, election, espionage, customs, national parks, migratory bird, extradition, maritime, land, and other laws.

The commissioners are still paid by the fees they collect. The Treasury first had supervision of their accounts, then the Department of the Interior, and finally, after the creation of the Department of Justice, the Attorney General. It speedily appeared, however, that it was not the accounting but the institution of trivial and frivolous proceedings to swell the fees of the commissioners which required control. Malicious prosecutions, trifling charges, and extortion were common in many districts. "Professional witnesses and informers make a business of hunting up petty violations of law for the express purpose of making fees, they themselves at the same time being the purchasers of the liquor so illicitly sold," reported a grand jury in California. Accused persons and witnesses were made to travel unnecessary distances to swell the income of particular commissioners,

<sup>44</sup> 1 Stat. 73, Secs. 30, 33, Sept. 24, 1789; *id.*, 333, Sec. 4, Mar. 2, 1794; *id.*, 609, July 16, 1798; *U. S. v. Maresca*, 266 Fed. 713 (1920); Atty. Gen. to Dist. Atty., Feb. 1, 1887, Instr. Bk. W, 20; Ex. Order 4439, May 8, 1926; Natl. Commission on Law Observance and Enforcement, *Proposals to Improve Enforcement of Criminal Laws* (1930), House Doc. 252, 71 Cong. 2 Sess., 23-24.

and the unrestricted numbers of these petty officers increased the confusion."

The Attorneys General made constant recommendations to Congress for thirty years after 1870. "I have no right to direct or instruct Commissioners," wrote Attorney General Hoar in 1870, "because they are *quasi* judicial officers, in no respect subject to the control of the Attorney General." Where abuses became too flagrant, the Attorney General appealed to the judges, but they were charitable toward their appointees. "Knowing better than those by whom they are appointed as to the proceedings of these commissioners," said Attorney General Akerman in 1872, "I think it would be well if they were made subject to removal upon recommendation by the head of this Department."

"If no check is placed on these Commissioners, it will require one hundred and fifty deputies to serve their process," wrote a marshal. "It will bring about a state of affairs that will cause twenty-five per cent of the population of this Territory to appear before their tribunals as defendants and witnesses." Finally, a means of control was found by directing the marshals not to execute trivial processes and the district attorneys not to prosecute extortionate cases. Their appointment was required to be reported to the Attorney General, who prescribed their seal and without whose consent no clerk of court could hold the office of commissioner."

With respect to all subordinate judicial officers, in the course of time a regular routine of investigation by officers of the Department of Justice developed. Examiners of the Department of Justice reported upon conditions in each judicial district. By 1911 systematic investigations of the clerks of court were under way. In 1912 thirteen examiners reported defaults and embezzlements by clerks, conversion of cash bail by commissioners, and irregularities of trustees in bankruptcy, all of which were promptly punished by forced resignations or criminal prosecution. Today, the appropriation acts customarily

<sup>66</sup> Ann. Reps. Atty. Gen. 1872, 7; 1887, 18; 1895, 6; Instr. Bks. No. 1, 167; R. 158; U, 438; No. 2, 452; Letter Bk. S, 167; Ex. and Cong. Letter Bk. No. 38, 383.

<sup>67</sup> Ann. Reps. Atty. Gen. 1872, 7; 1877, 9; 1878, 12; 1879, 13; 1880, 14; 1881, 12; 1887, 18; 1888, 16; 1890, 20; 1893, 24; 1894, 29; 1895, 6; Letter Bk. H, 263; Misc. Letter Bk. No. 25, 127; Instr. Bk. No. 1, 81; 29 Stat. 184, Sec. 19, May 28, 1896, as amended by 31 Stat. 956, Mar. 2, 1901; 34 Stat. 546, June 28, 1906.

provide funds for the investigation of the official acts, records, and accounts of marshals, attorneys, clerks, commissioners, referees, and trustees of the United States and territorial courts."

It is fundamental, however, that the operations of the courts proper are subject to no control or supervision by the executive. No federal department approximates a "ministry of justice" as that term is known on the continent of Europe. While the Department of Justice performs certain services for the judges, yet in their judicial functions they are entirely independent of both the President and the Attorney General. If it is desired that a judge be punished or removed for arbitrary and unjudicial action, the remedy lies in impeachment proceedings regularly begun in the House of Representatives and heard by the Senate. If it is desired to right a wrong done by a judge, this must be done if at all by proceedings in the higher courts, but even then not all actions of judges are subject to review or correction under the settled rules of practice. Indeed, the Attorneys General at times have been much annoyed by persistent demands for interference with the bench. "The Government cannot get fair play," wrote a district attorney, "where either of the Judge's three sons and particularly the youngest is employed by the defence." "Such letters can receive only the regrets of the Department of Justice.

While many types of abuse of judicial office are beyond any effective action of the executive, the Department of Justice has not always been able to close its eyes to charges of "grossest immorality and misbehavior" or "utterly intolerable" conduct. In the periodic investigation of the offices of district attorneys, marshals, clerks, and commissioners, and of the records of the courts, the examiners of the Department of Justice are naturally brought face to face with evidence of misconduct, which is then submitted to the Committee on the Judiciary of the House of Representatives.

Even this minimum function, however, is sharply criticized. "The Department of Justice is said to keep a large force busy in

<sup>44</sup> Ann. Reps. Atty. Gen. 1911, 22; 1912, 50; 1913, 47; 1915, 50; 1916, 63; 1917, 84; 1919, 7; 1922, 72; 49 Stat. 77, Mar. 22, 1935.

<sup>45</sup> Dist. Atty. to Devens, Feb. 17, 1881, D. J. Files, S. C.; and see Letter Bk. U, 476; Misc. Letter Bk. No. 4, 167; Misc. Letter Bk. No. 1, 130; Sisson, Nov. 12, 1929, D. J. Pers. Files, Ga.; Marshall, Feb. 9, 1928, *id.*, Ia.

vestigating charges against various officials," said the *Washington Evening Star* on January 22, 1906, when the secret service was under fire during the land frauds. "It has become popular to turn in charges against everybody and the next step is to send out an examiner to find out the accuracy of these charges and to listen to the 'knocks' that are handed around." "

There are other views of the matter. "The whole fabric of our Government is under scrutiny and that which, to my mind, is the keystone of the constitutional arch, namely, the judiciary, is particularly the object of criticism," said Attorney General Wickersham in congratulating a newly appointed district judge. "I think that a great many judges do not realize this and that the greatest opportunity to remove all just ground of complaint, and with it much unjust complaint, lies in the hands of the Federal judges themselves." " " Indeed, the vastly greater part of the contacts between the judiciary and the Department of Justice are in the interest of cooperation in shaping means for efficient administration of justice. Yet even in attempts at cooperation, particularly with the district courts, the Attorneys General have found it "a very delicate matter" to approach judges. "Abuse of executive power is notorious, and grows by what it feeds upon," exclaimed irascible District Judge Bourquin of Montana when the Attorney General, in a circular to clerks of court, called attention to a somewhat sweeping statute. "Incidentally, the author of the circular is not the first Attorney General to be obsessed by a delusion that federal courts are little more than appendages of his and the executive office." "

However, despite differences of station and function, judges and other law officers have common kinship with the law. The law officers of the executive department, through general experience at the bar and through systematic official appraisal of judicial business—first required in the Department of Justice Act of 1870"—are

" See also Misc. Letter Bk. No. 7, 330; Ann. Reps. Atty. Gen. 1913, 46, 47; 1922, 72; McReynolds to Wilson, Aug. 6, 1913, Sen. Doc. 156, 63 Cong. 1 Sess.; and letters exchanged between Mitchell and McKellar, May 13 and June 11, 1930, D. J. File 44W56-1, Sec. 2.

" To Thompson, July 22, 1912, D. J. Pers. Files, Pa.

" *In re Conciliation Commissioner*, 5 F. Supp. 131 (1933).

" 16 Stat. 162, Sec. 12, June 22, 1870; 17 Stat. 578, Sec. 1, Mar. 3, 1873; Ann. Reps. Atty. Gen. 1870, 4, 8; 1871, 2, 1872, 1; 1873, 4; 1896, 3; 1931, 9.

vitally concerned in the general maintenance and efficiency of the courts. In the broad field of the administration of justice the two departments have worked together. For example, in the first decade of the century, there began a movement to deprive the Supreme Court of authority to make rules in equity for the federal courts and instead to conform equity procedure to that of the different states. Attorney General Bonaparte believed that such legislation would result in changing the equity practice in the federal courts from a uniform and well-established system to many systems of much variety and many difficulties. The matter continued to be agitated.

"I quite agree with you that the experience of the past does not afford basis for enthusiastic expectation that the Supreme Court will revise its equity rules," his successor, Attorney General Wickersham, wrote the chairman of the House Judiciary Committee in 1910, "but with the new blood now going on the court, and the change in its headship, it may be that the court will take that subject up. I am going to avail of an early opportunity to talk to the new Chief Justice about it." Soon a committee of justices was at work, assisted by a secretary appointed from the Department of Justice, and the rules were promulgated November 4, 1912.<sup>81</sup>

Immediately the movement grew to secure similar uniformity in the rules in actions at law, but here legislative authority was required. Bar associations and lawyers became active. President Coolidge recommended legislation in his message of December 3, 1924. Yet Congress, largely because of the opposition of Senator Walsh of Montana, was not receptive.<sup>82</sup>

On May 31, 1932, President Hoover in a special message recommended that the Supreme Court be authorized to prescribe rules of practice in criminal cases after verdict, and Attorney General Mitchell brought the matter to the attention of Chief Justice Hughes. When this, too, seemed to be failing, he made a last appeal to the

<sup>81</sup> Bonaparte and Wickersham to Chairman, House Jud. Comm., Dec. 26, 1907, and Dec. 12, 1910, D. J. File 123106; see also letters of June 8, 1911, Aug. 22, 1911, Feb. 13, 1912, *ibid.*

<sup>82</sup> McReynolds to Stayton, April 7, 1913, D. J. File 123106; Ann. Reps. Atty. Gen. 1913, 6; 1914, 10; Walsh, *Reform of Federal Procedure*, Sen. Doc. 105, 69 Cong. 1 Sess. (1926); Sen. Rep. 1174, 69 Cong. 1 Sess. (1926); Sen. Rep. 440, 70 Cong. 1 Sess.

chairman of the Judiciary Committee of the Senate. On February 24, 1933, the measure became a law which, in the opinion of the Attorney General, was the most important statute of its time directed at the reform of criminal procedure in the federal courts. The Chief Justice desired the Attorney General to submit proposed rules, and this was done on May 25, 1933. After Mitchell's successor had secured amendatory legislation at the request of the Chief Justice, the new rules were promulgated on May 7, 1935."<sup>83</sup>

With the advent of the Roosevelt administration in 1933, the Attorney General secured the introduction again of the proposal to bring about uniformity and simplicity in practice in all civil actions in the federal courts—a proposal which had all but expired in the twenty years since the formulation of the equity rules. This time Congress responded promptly with the necessary legislation, which the Attorney General commended to the President as an important and vital step toward the improvement of legal procedure. As was the case with the equity rules, the Supreme Court requested the Department of Justice to participate in the preparation of the new rules."<sup>84</sup>

Through the newly created Judicial Conference, the judges have met and advised regularly with the principal officials of the Department of Justice and have recommended changes in the executive phases of law enforcement."<sup>85</sup> In transmitting the suggestions of the judges for congressional consideration, however, the Attorney General is but adding another bit to his traditional function of recommending legislation for the improvement of the administration of justice.

<sup>83</sup> Mitchell to Hughes, Mar. 1, 1932, D. J. File 123106; Mitchell to Hoover, Feb. 24, 1933, *ibid.*; Dept. Justice, Circular 2370 to U. S. Attys., Mar. 17, 1933, *ibid.*; Cummings to Hughes, May 25, 1933, *ibid.*; Hughes to Cummings, Jan. 11, 1934, *ibid.*; Cummings to Chairman Jud. Comm., Jan. 16, 1934, *ibid.*; 47 Stat. 904, Feb. 24, 1933; Ann. Rep. Atty. Gen. 1933, 5; 48 Stat. 399, Mar. 3, 1934, and 48 Stat. 926, June 7, 1934.

<sup>84</sup> Cummings to Chairman Sen. and House Jud. Comms., Mar. 1, 1934, D. J. File 123106; Cummings, *Immediate Problems of the Bar*, 20 A. B. A. J. 212 and 224 (1934); Clark and Moore, *A New Federal Civil Procedure*, 44 Yale L. J. 387, 389 (1935); Ann. Rep. Atty. Gen. 1935, 2; Cummings to Roosevelt, June 12, 1934, D. J. File 123106; 48 Stat. 1064, June 19, 1934; and See Letters of Jan. 16 and April 22, 1935, D. J. File 123106.

<sup>85</sup> Ann. Reps. Atty. Gen. 1924, addenda; 1925, 5-8; 1926, 5-10; 1927, 4-8; 1928, 3-5; 1929, 2-7; 1930, 4-8; 1931, 4-12; 1932, 6-12; 1933, 5.



Judges in English-speaking countries, so Sir James Stephen of the High Court of Justice of England has said, "are simply barristers who have succeeded in their profession." <sup>88</sup> Executive law officers, too, are lawyers on their various ways to success. Both play vital parts in the drama of government. One does not function without the other, and upon the proper performance of the duties of each depends the quality, indeed the very life blood, of justice. The judges, however, as Justice Miller said so many years ago, possess no power of the sword. In the exercise of that power, the executive law officers perform a final service to the courts and an ultimate duty in the execution of the laws.

Lulled by a tradition of law and order, Americans have become too much accustomed to the supremacy of the processes of organized society to realize that each year whole communities develop effective and often violent resistance to the execution of the laws. As a result, executive law officers are constantly concerned not alone with the ordinary and traditional judicial processes but with the stern necessity of preserving the courts themselves.

The Fundamental Orders of Connecticut of 1639—regarded as the first written constitution in the modern sense of the term—were adopted "to maytayne the peace," and the present Constitution of the United States was adopted to "establish Justice" and "insure domestic Tranquillity." <sup>89</sup> Yet Washington had his Whiskey Rebellion against the excise on distilled liquors, Adams his Fries Insurrection against the property tax, Jefferson his Burr's Conspiracy, and so on, administration after administration.

William Wirt a hundred and twenty-seven years ago despaired in language not unlike that heard in recent years. "Can any man who looks upon the state of public virtue in this country, and then casts his eyes upon what is doing in Europe, believe that this confederated republic is to last for ever?" he asked. "Think of Burr's conspiracy, within thirty-five years of the birth of the republic;—think of the characters implicated with him;—think of the state of politi-

<sup>88</sup> *Criminal Law of England* (1883), I, 452.

<sup>89</sup> Poore, *Federal and State Constitutions* (1877), I, 249-252; Johnston, *Connecticut: A Study of a Commonwealth-Democracy* (X, Am. Commonwealth Series; 4 ed. 1903), 63.

cal parties and of the presses in this country; think of the execrable falsehoods, virulent abuse, villainous means by which they strive to carry their points." \*\*

Opposition to the administration of the laws flared again and again with such violence as to require the intervention of the armed forces of the nation—the Negro insurrections (1831), the nullification excitement (1832), the Black Hawk War (1832), the Cherokee Indian troubles (1833, 1838), the Patriot War (1837–1838), the Iowa boundary incident (1839), the Dorr rebellion (1842), the Boston fugitive slave cases (1851), the Anthony Burns riots (1854), the Kansas disturbances (1854–1858), the California vigilantes (1856), the Mormon rebellion (1851–1858), John Brown's raid (1859), the Fenian invasion (1866), the reconstruction era (1866–1876), the labor riots of 1877, lawlessness in the territories (1878–1894), the Coxe movement and Pullman strike (1894), the Idaho (1899), Nevada (1907), Colorado (1914), and West Virginia (1921) labor troubles. These classics of national history brought intervention by the federal government. In addition, there have been as many as five hundred calls for state troops in a quarter century,\*\* and countless further occasions are met solely by extraordinary efforts of civil officers of the nation and the states.

Measures to cope with such cases of major lawlessness require the most delicate judgments of non-judicial law officers, to determine the measures necessary at the moment to restore the processes of the courts and to regain domestic peace. However clear the law or damaging the resistance, each incident is complicated by the number of citizens, the public passions, and the insistent conflicting economic or social demands involved. Indeed, for this very reason, the local peace officers often stand by inactively in the greater or more difficult crises, and at the same time the federal executive authorities must weigh the necessity of national action against a tradition for domestic peace maintained by local authorities.

Cases of lesser magnitude, ordinarily for the attention of local officers, raise the most difficult questions of policy. "The State gov-

\*\* To Benjamin Edwards, Dec. 22, 1809, Kennedy, *op. cit.*, I, 246–247.

\*\* See *Federal Aid in Domestic Disturbances*, Sen. Doc. 209, 57 Cong. 2 Sess. (1903), and Sen. Doc. 263, 67 Cong., 2 Sess. (1922).

ernments are designed to be the regular and usual protectors of person and property," said Attorney General Akerman in 1871, "and when they fail in this, through the indisposition of officials, or private citizens, it is hard to accomplish the result in any other way." Nevertheless, as Attorney General Cushing said, "to guard against violence by wrong-headed, misguided, disloyal citizens, or by foreign force, is an important obligation of every Government,—the grand purpose and consideration, indeed, for which it is instituted." \*\*

"There is a peace of the United States," says the Supreme Court. "We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." \*\* With this broad authority, the executive must determine when and how to preserve the regular processes of justice.

The marshals of the United States are the first line of federal defense on occasions of domestic disturbance. Inheriting in the federal sphere the powers of the sheriffs at common law and in the colonies and states, they are directed by the Judiciary Act of 1789 to execute all lawful "precepts" issued under the authority of the United States, and they have authority to command all necessary assistance and to appoint deputies. The authority of the marshals "to command all necessary assistance" is a restatement of the ancient right of the sheriff to summon to his aid all able men as a *posse comitatus*,\*\* but instead the marshals have generally exercised their power to appoint deputies by tens, hundreds, or thousands where required.

Here, in times of great public excitement, the need of tact is uppermost. "You should spare no effort to avoid a breach of the peace, and by no unlawful methods should you provoke violence," directed Attorney General Miller in 1889. "In selecting your deputies it will be important that you find men of prudence, as well

\*\* *Bates Diary*, *op. cit.*, 403; Akerman to Dist. Atty., Feb. 11, 1870, Instr. Bk. B-1, 299; Cushing, 6 Op. 446, 472.

\*\* *In re Neagle*, 135 U. S. 1, 69 (1890); see also James, *op. cit.*, 55-56.

\*\* Ch. II, *supra*; 1 Stat. 87, Sec. 27, Sept. 24, 1789; Cushing, *op. cit.*, 466, 469, 471; Williams to U. S. Marshal, Sept. 15, 1874, Instr. Bk. E, 31.

as courage; and it is hoped that by the exercise of prudence and firmness on your part, and those whom you will select to assist you, trouble may be avoided." \*\*

The disorders attending the Coxe movement and Pullman strike of 1894 illustrate the action of federal law officers on a nation-wide front.\*\* When the civil forces fail, however, no course is left to the executive save resort to the military. The Constitutional Convention of 1787 had met following upon Shays' Rebellion in Massachusetts, disorders of discharged soldiers of the Continental Army who in demanding settlement of their accounts "wantonly pointed their muskets to the windows of the Hall of Congress," \*\* and the hostility of Indian tribes on the frontier, to say nothing of the struggles of the Revolution itself. The necessity of military force thus confronted men determined, on the other hand, to outlaw instruments of oppression.

The records of the convention and debates upon the proposed Constitution reveal a common dislike of standing armies and objections to the control of local troops by the proposed federal government. "As it now stands," wrote Luther Martin, delegate to the Convention and Attorney General of Maryland, "the Congress will have the power, if they please, to march the whole militia of Maryland to the remotest part of the Union, and keep them in service as long as they think proper, without being in any respect dependent upon the government of Maryland for this unlimited exercise of power over its citizens—all of whom, from the lowest to the greatest, may, during such service, be subjected to military law, and tied up and whipped at the halbert, like the meanest of slaves." \*\*

Despite objections, the Constitution, as proposed, was adopted. It provided a system of organized federal and state troops; the latter, first known as the "militia," are now the "National Guard." The Congress was empowered to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, repel

\*\* Miller to U. S. Marshal, Sept. 10, 1889, Instr. Bk. No. 4, 440; Acting Atty. Gen. to U. S. Marshal, July 5, 1893, Instr. Bk. No. 31, 126.

\*\* Ch. XXI, *supra*; Ann. Reps. Atty. Gen. 1894, 30; 1896, App.

\*\* Jr. Cong., June 19-21, 1783.

\*\* Jan. 27, 1788, *Federal Aid in Domestic Disturbances*, *op. cit.*, 14.

invasions, guarantee to every state a republican form of government, and put down domestic violence."

Five days after approving the Judiciary Act in 1789, President Washington signed a measure to recognize and adopt the existing military establishment of the confederation. Three years later the Second Congress increased the number of troops for the protection of the frontiers, the President being empowered to employ "such number of Indians, and for such compensations, as he may think proper." Two months later he was authorized to call forth the militia in cases of imminent danger of invasion from any foreign nation or Indian tribe, insurrection in any state, or where the execution of the laws of the United States was obstructed "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." "

While these measures were becoming law, the "Whiskey Rebellion" against the collection of excise taxes was brewing. When it broke forth, Washington suppressed it. "While there is cause to lament that occurrences of this nature should have disgraced the name or interrupted the tranquillity of any part of our community," he reported in his annual message to Congress, "it has demonstrated that our prosperity rests on solid foundations." A well-regulated militia would be a genuine source of legislative honor and a perfect title to public gratitude, he continued. "I therefore entertain a hope that the present session will not pass without carrying to its full energy the power of organizing, arming, and disciplining the militia, and thus providing, in the language of the Constitution, for calling them forth to execute the laws of the Union, suppress insurrections, and repel invasions." "

Special legislation authorized the stationing of militia in the troublesome area. It was proposed, among other things, to supply the President with a select corps of militia and to empower him to call upon the governors of states to organize, arm, equip, and hold

" Constitution, Art. I, Sec. 8; Art. IV, Sec. 4; 1 Stat. 271, May 8, 1792; 32 Stat. 775, Jan. 21, 1903; 48 Stat. 153, Sec. 9, June 15, 1933, or 32 U. S. C. 4b.

" 1 Stat. 95, Sept. 29, 1789; *id.*, 222, Mar. 3, 1791; *id.*, 241, Mar. 5, 1792; *id.*, 264, Secs. 1, 2, May 2, 1792.

" See *Federal Aid in Domestic Disturbances*, *op. cit.*, 26-33.

in readiness to march at a moment's warning 80,000 troops. Restraints upon the President's discretion to call upon the armed forces were removed.<sup>10</sup> Thus, early in the history of the United States, the means of exercising the ultimate power of the nation became established.

In the course of time, the Presidents have become authorized to use the army and navy for the same purposes as the militia, and the language of the basic statutes has been amplified to permit the use of troops to secure the equal protection of the laws in the enforcement of constitutional rights. However, the Congress has not authorized the President to enforce that provision of the Constitution which guarantees to every state a republican form of government, and in the absence of legislation the Supreme Court has held that the enforcement of this guaranty is neither a matter for the courts nor the executive but "primarily a legislative power, and resides in Congress."<sup>11</sup>

Under that provision of the Judiciary Act authorizing the marshals to command all necessary assistance, it came to be established that they might summon any troops within their respective districts. For years the military thus served under federal civil peace officers in the execution of the laws through judicial process. "A troop of Cavalry for my purposes is worth a Brigade of Infantry," wired a marshal in 1874. "You must get along with infantry," Attorney General Williams replied, after communication with the Secretary of War.

This method of enforcing the laws in the South during reconstruction times, particularly at elections, moved the Congress in 1878 to deny such power to the marshals. While Attorney General Devens believed that this restriction seriously crippled the execution of the laws of the United States, the power of the President to call the troops to execute the laws was unaffected. Troops were thereafter used not as a *posse comitatus* under the command of the

<sup>10</sup> 1 Stat. 403, Nov. 29, 1794; House Jr., 3 Cong., 101, 108, 114; 1 Stat. 424, Feb. 28, 1795.

<sup>11</sup> 2 Stat. 443, Mar. 3, 1807; 12 Stat. 281, Sec. 1, July 29, 1861; 17 Stat. 13, Sec. 3, April 20, 1871; 32 Stat. 775, Sec. 4, Jan. 21, 1903; 35 Stat. 399, Sec. 3, May 27, 1908; *Texas v. White*, 7 Wall. 700, 730 (1868).

marshal but simply as armed forces under the immediate direction of the President through the army officer personally in command."

Ordinarily, the United States judges, attorneys, and marshals direct their requests for military aid to the Attorney General who, through the President, secures troops upon the order of the Secretaries of War or Navy. Here the Attorney General has two functions—to advise the President *when* civil justice is no longer effective and *how* under the Constitution and laws the troops may be used."

Officers of the law have generally endeavored to avoid the use of military force. "But so we go," sighed Attorney General Bates, in the heat of civil war, "the civil law is too weak and too slow to suit the hot haste of our new patriots—Everything must be done by military power; and every petty subaltern imagines *himself master of the horse*, to the *Dictator*. If these men have their way a little longer, there will be nothing left of law but final judgment, and no process of justice, but Execution." <sup>73</sup>

Yet, where used in domestic crises, the military is limited to aiding and reestablishing the processes of civil justice. "Both Military Government and Martial Law have well defined positions in the field of International Law," states a military manual of today. "In Domestic Disturbances, on the other hand, the employment of federal military aid does not displace the laws of the land, but *sustains* them by brushing aside interference with their administration by the proper State or Federal civil officials." This same view had been insisted upon by Attorney General Olney more than thirty years before, over the contrary view of some military officers, during the Pullman strike. It was not the soldiers that ended the strike, labor

<sup>73</sup> Cushing, *op. cit.*, 466, 473; Williams, Sept. 4, 1874, Oct. 28, 1874, D. J. Files, Ala., and Instr. Bk. E, 108; 20 Stat. 145, Sec. 15, June 18, 1878; Cong. Rec., IV, 3845-3852; *id.*, V, 4181, 4239-4248, 4295-4305, 4648, 4686; Winthrop, *Military Law and Precedents* (2 ed. 1886), II, 1352-1356; Devens to Sp. Asst. U. S. Atty., July 27, 1878, Instr. Bk. H, 212; 16 Op. 162; 17 Op. 71, 242, 333; 19 Op. 293, 570; Ann. Rep. Atty. Gen. 1894, 30.

<sup>74</sup> See *id.*, 1894, 33-34; Bates Diary, *op. cit.*, 310; 1 Op. 164; 3 Op. 255; 8 Op. 445; 9 Op. 516; 29 Op. 322.

<sup>75</sup> Bates Diary, *op. cit.*, 332 and see 350.

leader Debs said at a subsequent inquiry. "It was simply the United States courts." "

With the development of state troop organization under the National Guard statutes, the governors of states are enabled to relieve the federal government of the duty of restoring order. It is the tendency of many governors, nevertheless, to use state troops for matters where no violence is involved and to submit passively to serious disturbances. Moreover, much has transpired since an excited citizen in 1874 requested troops because of the arrival of "new breach loading double barrellled shotguns, with fixed ammunition plenty." " The scientific improvements of the twentieth century have called for more adequate organization and preparation not only in the Departments of War and Navy, but also in the Department of Justice and its field forces. "Military power," said the Supreme Court nearly a century ago, "is essential to the existence of every government, essential to the preservation of order and free institutions." " To what extent the marshals, posses, army, navy, and militia will be used in domestic affairs in the future to maintain the regular processes of justice necessarily depends on skill and statesmanship in solving the insistent problems of the day and preserving essential American democracy.

" *Military Aid to the Civil Power* (General Service Schools, Ft. Leavenworth, Kan., 1925), iii and 230 *et seq.*; *Ex parte Milligan*, 4 Wall. 2, 127, 141-142 (1866); James, *op. cit.*, 48-52; Sen. Ex. Doc. 7, 53 Cong. 3 Sess., 143; *In re Debs*, 158 U. S. 564, 597-598 (1895).

" See James, *op. cit.*, 53 *et seq.*; letter of Oct. 2, 1874, D. J. Files, Ala.

" *Luther v. Borden*, 7 How. 1, 45 (1849).





## BIBLIOGRAPHICAL NOTE

THE preparation and publication of this volume, in addition to preserving a portion of the story revealed in gathering together and systematizing the records of the Department of Justice, is designed to furnish starting points for further and more detailed research. The topics treated by no means exhaust the materials. Some great fields of public justice, among them taxation, claims, customs and Indian matters, are barely touched. Moreover, considerations of time and space have made it necessary to reduce the contents of chapters to a minimum.

The notes to the text refer to general or secondary works and collections wherever possible, since these are more readily available to the average student or lawyer. In most cases the references, each of which often applies to a whole paragraph or series of paragraphs, have been grouped to avoid undue repetition. In the text, they are appended at the close of each subject rather than at its first mention. In many cases they are illustrative rather than exhaustive. It has been necessary to limit cross references; the carefully prepared index should be studied in order to discover all materials on a particular point.

A partial description of the archives of the Department of Justice will illustrate the nature of the materials made available for this study.

### 1. *Original Records of Department of Justice*

Incoming correspondence, opinions, court records, notes for argument, political correspondence, and drafts of legislation for the period 1817-1870 (a few items dating as far back as 1790) were found in bundles, boxes, and portfolios. For the period from 1850 to 1857, for which no letter book exists, these loose manuscripts also furnish the main store of outgoing correspondence. These papers are cited singly in this volume as "A. G. Ms." Similar loose correspondence or other manuscripts from 1870, when the Department of Justice

was established, to 1904, are cited as "D. J. Ms." The remainder of the incoming correspondence for this period (1870-1904) was folded in individual wrappers and numbered; these folded files are cited as, for example, "D. J. File 7622-1892."

A *Register of Letters Received*, listing the subject matter and disposition of each letter, was begun some time after the organization of the Department of Justice and was projected back as far as 1817. Other types of registers were kept for limited periods. Since 1904, when the present flat file system was adopted, both incoming and outgoing correspondence have been bound and filed together according to a comprehensive numbering and indexing system. These are cited as, for example, "D. J. File 00000."

From 1818 to 1890, much of the outgoing correspondence was copied into twenty-eight volumes of *Letter Books*. This series was originally designed to contain letters to Presidents, cabinet members, the houses and committees of Congress, judges, district attorneys, other officers, and private citizens. They related to all sorts of public business of every character. Not infrequently letters from the earlier volumes found their way into the published opinions of the Attorneys General, either because they described the opinion function or because they resembled opinions. On rare occasions important incoming letters were entered in the earlier volumes.

The first letter book devoted to a single subject covers the period from 1830 to 1840 and is called *Letters to the Solicitor of the Treasury*. After 1840 this class of letters appears in the general letter books. In 1867, the series of two hundred and thirty-two *Instruction Books* began. These contain the Attorney General's directions to district attorneys and marshals until 1904. Comparable in character to these books are the eleven volumes of *Instructions to Examiners* beginning in 1893 and ending in 1907. From 1871 to 1904, ninety-four volumes of *Executive and Congressional Letter Books* contain letters to the President, heads of departments, and members of Congress. From 1890 to 1904, other outgoing letters were bound into sixty-five *Miscellaneous Letter Books*.

More than one hundred volumes of letters relating to the cases pending in the Court of Claims from 1868 to 1914 are to be found in

the *Court of Claims Letter Books* and the *Court of Claims and Miscellaneous Books*. These include nine press copy volumes of the letters written by special counsel to the Treasury, Robert S. Hale, between 1868–1870. The volumes for 1892 and 1893 contain some miscellaneous correspondence. There is considerable material relative to cases arising out of the Civil War.

There is a separate series of forty-one letter books, 1891–1913, dealing with Indian Depredations. In connection with the work of the Bureau of Insular and Territorial Affairs there are nine volumes, 1902–1906, containing letters to various government officers and individuals regarding all sorts of legal matters arising in the territories and insular possessions.

When in 1870 the supervision over the accounts of district attorneys and marshals was transferred to the Department of Justice from the Department of the Interior, a collection of *Judiciary Letter Books* begun in 1849 came into the new department's possession and was expanded and continued in twenty-four volumes until 1884. Here are preserved various types of data regarding the functions of the officers of the courts and judicial administration. Several series of books carry beyond 1890 the correspondence with the officers of the courts. There are eleven volumes of books of letters on litigation in the lower courts of the United States from 1890 to 1904, and a large collection of *Docket Books* makes it possible to trace cases through the different federal courts step by step.

Seven volumes of *Circular Books*, begun in 1856 and running to date, contain official circulars or copies thereof, issued from time to time for the guidance of the employees of the department in Washington and to district attorneys, marshals, and others in the field.

From 1817 until 1904, the official opinions rendered to the President and the heads of departments were recorded in forty-one *Opinion Books*, similar in format to the letter books. While these books do not contain every opinion written, they constitute the most complete collection and include much which is omitted from the published opinions of the Attorneys General. There is also a set of letter press books of opinions, beginning in 1870 and extending well down toward the present day. There is also a book of *Reports of the Attor-*

ney General containing copies of reports to Congress for the period 1790-1797, with one report for 1818. Wholly apart from the opinion books are the eighteen volumes of *Title Opinions*, beginning in 1841 as a result of the joint resolution of Congress requiring the Attorney General's opinion on the title to lands before purchase by the United States.

In addition, there also exists a large amount of material on diverse subjects, including accounting, appropriation, and other financial information; personnel and pardon manuscripts and records; books of appointments; docket books covering such subjects as French Spoliation cases; reports from district attorneys, marshals, and clerks of courts to the appropriate officers of the Treasury Department, dating back to the time of the Agent of the Treasury in 1821; and a large number of portfolios and packages contain papers relative to the proceedings before the commission established under the treaty of peace with Spain in 1898.

A more detailed *Inventory of Material on Bookracks*, prepared by Robert B. Thompson, Jr., and William T. Parker, able assistants in the Mail and Files Division of the Department of Justice, lists 117 pages of miscellaneous records and collections of material. Current files and some of the older materials on federal prisons and prisoners are in the separate custody of the Bureau of Prisons Filing Section, under the competent direction of Vernon V. Thompson. Reports of investigations made by the agents of the Bureau of Investigation are kept in the file rooms of the Bureau. Much of the pardon material is in the office of the Pardon Attorney.

## 2. *Original Sources in Other Federal Departments and in the Library of Congress, etc.*

The various collections of the papers of Presidents and cabinet officers in the Library of Congress yield many items relating to the administration of justice. They include the papers of Jeremiah S. Black, Charles J. Bonaparte, John Breckinridge, Grover Cleveland, John J. Crittenden, Caleb Cushing, James A. Garfield, Thomas Jefferson, Reverdy Johnson, Philander C. Knox, James Madison, Richard Olney, James K. Polk, Caesar A. Rodney, Theodore Roose-

velt, Richard Rush, Edwin M. Stanton, Roger B. Taney (Bank War Ms.), George Washington, and William Wirt. Similar papers are in the possession of other public libraries, private individuals, and historical societies.

Voluminous records are to be found in other departments of the federal government, particularly in the Treasury (e.g., tax correspondence and opinions, litigation on debts due the United States), State (e.g., opinions, pardons, and remissions), and Interior (e.g., opinions on Indian affairs) Departments.

### *3. Printed and Secondary Unofficial Sources*

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#### 4. *Official and Semi-Official Printed Documents*

Among the more valuable sources of information are the several series of the debates and proceedings of Congress (*Annals of Congress*, *Register of Debates*, *Congressional Globe*, *Congressional Record*, and the journals of the House and Senate), the *American State Papers*, Richardson's *Compilation of the Messages and Papers of the Presidents*, and the annual reports of the Attorney General and other cabinet officers, departments, and agencies. Congressional documents, for which the Documents Catalogue and the Documents Index of each Congress and session should be consulted on particular subjects, contain reports and other material on all phases of the administration of justice. Many of these on specific subjects are listed in the notes to the text. The dockets, files, and reports of the federal courts are, of course, invaluable sources of information.

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- Charles Lee, 1795-1801, Va., Washington, Adams.
- Levi Lincoln, 1801-1805, Mass., Jefferson.
- John Breckinridge, 1805-1806, Ky., Jefferson.
- Caesar A. Rodney, 1807-1811, Del., Jefferson, Madison.
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- Benjamin F. Butler, 1833-1838, N. Y., Jackson, Van Buren.
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- Henry D. Gilpin, 1840-1841, Pa., Van Buren.
- John J. Crittenden, 1841, Ky., Harrison, Tyler.
- Hugh S. Legaré, 1841-1843, S. C., Tyler.
- John Nelson, 1843-1845, Md., Tyler.
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- Wayne MacVeagh, 1881, Pa., Garfield.
- Benjamin H. Brewster, 1881-1885, Pa., Arthur.
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- Charles J. Bonaparte, 1906-1909, Md., Roosevelt.

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